Supreme Court, U.S.
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No. 03-

IN THE

# Supreme Court of the United States

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, AND LYLA C. WEESE, INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

*Petitioners,*

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Alaska**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Alaska Supreme Court erred in holding that only the Privileges and Immunities Clause, and *not* the Commerce Clause, is implicated by Alaska's imposition of fees on nonresident commercial fishermen that are three times greater than those imposed on resident commercial fishermen.

2. Whether the Alaska Supreme Court erred in holding that the constitutional limits on "compensatory" taxes under the Commerce Clause do not apply to allegedly compensating taxes under the Privileges and Immunities Clause, thereby permitting Alaska to impose on nonresident commercial fishermen the general costs of state government.

## PARTIES TO THE PROCEEDINGS

Other than the unnamed members of the plaintiff class, all of whom are individual commercial fishermen who are not residents of Alaska, there are no petitioners or respondents in addition to those named in the caption.

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## PETITION FOR A WRIT OF CERTIORARI

Donald H. Carlson, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, individually and as class representatives on behalf of all persons similarly situated ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

## OPINIONS BELOW

The opinions of the Supreme Court of Alaska are reported as follows: *State of Alaska v. Carlson* (*Carlson III*), 65 P.3d 851 (Alaska 2003) (App. 1a-52a); *Carlson v. State of Alaska* (*Carlson II*), 919 P.2d 1337 (Alaska 1996) (App. 56a-82a); and *Carlson v. State of Alaska* (*Carlson I*), 798 P.2d 1269 (Alaska 1990) (App. 88a-112a). The unreported final orders of the Superior Court of the State of Alaska are reproduced in the Appendix to this Petition as follows: "Findings of Fact and Law" (August 8, 2000) (App. 53a-55a); "Decision and Final Order on Reconsideration of the Court's August 12, 1993 Order and Final Decision Granting the State's Motion for Summary Judgment" (July 25, 1994) (App. 83a-87a); "Final Order" (Feb. 21, 1989) (App. 113a).

## JURISDICTION

The Supreme Court of Alaska entered its judgment on March 14, 2003. On June 5, 2003, Justice O'Connor granted Petitioners' application to extend the time in which to file the petition for writ of certiorari to and including July 12, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are located in the Appendix to this Petition at App. 114a-126a.

## STATEMENT

The case presents important questions as to whether, consistent with the Commerce Clause and the Privileges and

Immunities Clause, Alaska may discriminate against nonresident commercial fishermen by charging them three times the licensing and permitting fees it charges resident commercial fishermen for access to the State's fisheries. The Supreme Court of Alaska analyzed the fee differential under the Privileges and Immunities Clause but concluded that the Commerce Clause has no application to the State's commercial-fishing-license scheme. The Alaska court's analysis led it to endorse under the Privileges and Immunities Clause a facially discriminatory fee that would be invalidated under this Court's long-standing Commerce Clause and compensatory-tax jurisprudence.

**1. The Alaskan License and Permit Tax Schemes.** Because Alaska controls the waters within three miles of its shore,[1] the state has the power to impose licensing and permitting fees for access to its fisheries. *See Alaska v. Arctic Maid*, 366 U.S. 199, 203 (1961); *Toomer v. Witsell*, 334 U.S. 385, 393 (1948); Alaska Stat. §16.43.100(a)(18). Fishermen seeking to operate fishing gear in the most intensively used Alaska commercial fisheries must purchase a limited entry permit.[2] Alaska Stat. § 16.43.140(a). A crewman working on the vessel of a gear license operator does not need a permit but must purchase a commercial fishing license. Alaska Stat. § 16.05.480 (App. 115a-117a).

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[1] *See* 16 U.S.C. § 5102(6) (establishing an "Exclusive Economic Zone" (EEZ) in the area running three nautical miles to 200 nautical miles from shore; waters within the EEZ are, in general, regulated by the federal government, while the area from the shore out to three nautical miles is generally regulated by the states).

[2] The limited entry permit program is designed to maintain the "stability" of Alaska's fisheries resources by "regulating and controlling entry" into its commercial fisheries. *See* Title 16, Art. 43, Alaska Stat.; Commercial Fisheries Entry Comm'n, 2001 Annual Report at 1, *available at* http://www.cfec.state.ak.us/annrpts/ar2001.pdf. Respondent Commercial Fisheries Entry Commission ("CFEC") is the regulatory body created to manage that program. Alaska Stat., § 16.43.020.

Until 2001, a nonresident permit holder or nonresident crewman paid three times the fee residents paid. App. 117a, 122a. In actual dollars, residents annually paid between $50 and $250 for limited entry permits; nonresidents paid $150 to $750 for the same permit. App. 122a. Nonresidents therefore were required to pay as much as $500 more than residents for the same permit, year after year. Resident crewmen were charged $30 for a commercial license, while nonresidents paid $90 for the same license. App. 117a. Beginning in 2001, in response to the *Carlson* decisions, Alaska amended its statutes to equalize resident and nonresident permit and license fees, setting a uniform "base fee" but continuing to impose a surcharge on all nonresidents, both permit holders and crewmen, a fee differential based solely on their nonresident status. Alaska Stat. §§ 16.05.480(h), 16.43.160(e) (App. 116a, 118a).[3] This differential is calculated from a formula first advanced in *Carlson II*. Based on Alaska's discovery responses, petitioners estimate that the nonresident surcharge under the *Carlson II* formula will vary between $150 and $200 annually, and could be significantly higher, depending on how the state defines its fisheries costs under the formula.

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[3] As a result of this case, the state amended Section 16.05.480 to provide that a resident adult will be charged $60 for a crewmember fishing license, while a nonresident must pay "$60 plus an amount, established by the [Commercial Fisheries Entry Commission] by regulation, that is as close as is practicable to the maximum allowed by law." Alaska Stat. §16.05.480(g)-(h) (App. 116a). The "maximum allowed by law" refers to the fee differential formula approved by the Alaska courts in this case, discussed in detail *infra*. Like the commercial fishing license fee statute, the statute governing limited entry permit fees was similarly amended during the *Carlson* litigation. It now provides that the base fee for a limited entry or interim-use permit "may not be less than $10 or more than $300"; the fee for nonresidents "*shall* be higher than the annual base fee by an amount, established by the [CFEC] by regulation, that is as close as is practicable to the maximum allowed by law." Alaska Stat. § 16.43.160(e) (App. 118a) (emphasis added).

The resulting economic disadvantage to nonresident commercial fishermen, and the adverse impact on interstate commerce, is both obvious and significant.

**2. The Proceedings Below.** Petitioners are a class of nonresident commercial fishermen who have been required to pay at least three times as much as Alaska residents to obtain fishing licenses and permits to fish in Alaska's territorial waters. App. 1a-2a, 88a-89a. In 1984, Petitioners filed suit in Alaska Superior Court, challenging Alaska's discriminatory commercial-fishing-license fee statutes and regulations, specifically Alaska Stat. §§ 16.05.480 and 16.43.160(b), and Alaska Admin. Code tit. 20, § 05.240, as violative of the Interstate Commerce and Privileges and Immunities Clauses of the United States Constitution. App. 2a-3a, 88a-89a. This case has now gone to the Alaska Supreme Court three times.

***Carlson I.*** On cross-motions for summary judgment, the Alaska Superior Court held that both Clauses apply to the discriminatory Alaska license scheme. The court nonetheless found no Commerce Clause violation because the "legitimate local purpose" of "ensuring that nonresidents pay their fair share of [fisheries] management costs . . . justified the discrimination, assuming the fee differential bore a substantial relationship to the purpose." App. 96a. The Superior Court also found no violation of the Privileges and Immunities Clause because the state had demonstrated a "permissible" reason for the discriminatory fee: "to have the non-resident [fishermen] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of the state, which costs are largely borne by the residents through general fund expenditures." App. 95a. The Superior Court ultimately determined that the figures submitted by the state reflected the costs to Alaska of managing its commercial fisheries, and that the fee differential fairly reflected nonresidents' "fair share" of those costs. App. 95a-96a, 97a.

On appeal, the Alaska Supreme Court agreed with the Superior Court that commercial fishing "license fees which discriminate against non-residents are *prima facie* a violation" of the Privileges and Immunities Clause, App. 98a, but remanded for consideration of "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." App. 105a-106a. Only if the "higher fees charged nonresidents are excessive" in comparison to the economic burden borne by state residents to support the state's fisheries would the differential be unconstitutional. App. 106a. Alaska residents pay no state income tax. Instead, the majority of the state's budget was derived from petroleum taxes and state oil royalties. *See* App. 106a (for fiscal year 1986, 86 percent of state revenues derived from oil production). The Alaska Supreme Court treated each resident's share of oil revenues as equivalent to a tax payment, on the theory that revenues allocated to fisheries management that could have been put to other uses reflect "benefits foregone" by each resident. App. 106a.

With respect to the Commerce Clause, the Alaska Supreme Court stated that the analysis, "assuming [the Clause] is implicated," would be similar to the analysis under the Privileges and Immunities Clause. App. 103a. The court noted that early cases from this Court "suggested that the Commerce Clause does not come into play until the fish are actually harvested . . . ," although "[d]ictum in more recent cases suggests the contrary." App. 103a n.4. The Alaska Supreme Court reached no firm conclusion about the applicability of the Commerce Clause in *Carlson I*.

***Carlson II.*** On remand, the parties were required to propose a method by which to compare the fees paid by nonresidents with the expenditures of state revenues "to which non-residents make no contribution." App. 59a. The

Superior Court rejected Petitioners' formula, which compared each Alaska resident's per capita contribution toward maintaining Alaska's commercial fisheries with the fee differential, and instead adopted the state's proposed approach, which "in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by non-residents." App. 59a. Applying that analysis, the Superior Court concluded that the discriminatory fees did not violate the Constitution because "[r]esidents pa[id] by way of taxes, or the economic equivalent of taxes, *i.e.*, benefits foregone, substantially more than non-resident fishers pay toward the benefits received. . . ." App. 86a.

On appeal, the supreme court held that the higher license cost for nonresidents did not implicate the Commerce Clause. According to the court in *Carlson II*, harvested fish only become articles of commerce when they cross state lines. Because "the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits," App. 62a, the court concluded that the Commerce Clause does not apply. App. 62a-63a.

As to the Privileges and Immunities Clause, the Alaska Supreme Court refused to apply this Court's longstanding "compensatory tax" jurisprudence, then most recently articulated in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93 (1994), in which this Court held that the Commerce Clause does not permit states to consider residents' contributions to general tax revenues as compensating for higher fees imposed on out-of-state competitors. App. 65a. Instead, the Alaska Supreme Court held that the Alaska fee differential "merely balances out 'any conservation expenditures from taxes which only residents pay,'" a result the court found permissible under the Privileges and Immunities Clause in light of *Toomer v. Witsell*, 334 U.S. at 399. App. 66a.

The Alaska Supreme Court in *Carlson II* approved Petitioners' proposed *per capita* formula, which had been rejected by the trial court, and rejected the *pro rata* method proposed by the state and adopted by the trial court. App. 67a-69a. The court conceded that the comparison advocated by the state–the total fisheries-related expenditures made by the state verses the total contribution made by nonresident fishermen–would violate the *Oregon Waste* prohibition on compensatory taxes. App. 68a & n.16. The court believed, however, that the *per capita* formula avoided this problem by comparing each Alaska resident's individual contribution toward fisheries management with the fee differential assessed against each individual nonresident fisher. The *Carlson II* court thus remanded the case to the Superior Court for application of the *per capita* formula in order to determine whether any nonresidents were due a partial refund of fees paid. App. 69a.[4]

Justice Rabinowitz dissented. App. 76a-82a. He would have applied the compensatory tax analysis of *Oregon Waste* to the Privileges and Immunities analysis of the Alaska fee differential. App. 78a. Justice Rabinowitz explained that the distinction drawn by the Alaska Supreme Court between the *per capita* and *pro rata* formulae is meaningless and does not save the discriminatory fee from invalidity under the compensatory tax rationale: "The approach authorized by [*Carlson II*] seems to place greater emphasis on the theoretical equality of individual contributions than the

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[4] Under the *per capita* formula, the state's fisheries budget is divided by the Alaska population. That amount then is multiplied by the percentage of the state's budget derived from oil revenues, to determine each Alaska resident's *per capita* contribution to the management and conservation of the state's fisheries (by virtue of benefits foregone). App. 72a-73a. The resulting figure is compared to the nonresident fee differential to determine whether the differential is constitutionally excessive. App. 69a.

Oregon tax did. There is, however, no indication that the Oregon tax was designed to impose on out-of-state interests their 'entire share' of solid waste disposal costs nor, for that matter, that the shares of disposers of in-state waste . . . were to be borne by the entire population." App. 79a n.3. And even "[m]ore importantly, the decision in *Oregon Waste Systems* did not turn on the fact that the surcharge was excessive but rather on the conclusion that any surcharge was constitutionally offensive under the circumstances." *Id.*

This Court denied certiorari. *Carlson v. Alaska Commercial Fisheries Entry Comm'n*, 519 U.S. 1101 (1997).

***Carlson III.*** On remand, the Alaska Superior Court held an evidentiary hearing to determine what state expenditures comprised the components of the formula approved by the *Carlson II* court. The Superior Court adopted virtually wholesale the state's proposed method for computing both its annual fisheries budget and the percentage of the total state budget derived from oil revenues for fiscal year 1996, and accepted without further inquiry the figures supplied by the state in making its calculations. Using the state's figures, the court determined a maximum allowable fee differential that could be charged to nonresidents in 1996 consistent with the *Carlson II* formula, App. 53a-55a, and directed the parties to use the court's methodology to calculate the allowable fee differential for each year going back to 1984. Rather than perform this accounting, both parties appealed.

On appeal, the Alaska Supreme Court in *Carlson III* declined to reconsider its *Carlson II* Commerce Clause holding, despite two then-recent decisions of this Court: *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), and *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997). App. 14a-24a. Reiterating its *Carlson II* reasoning, the court declared *Fulton Corp.* inapplicable "because commercial fishing licenses are not objects of interstate commerce" and because the Alaska fee differentials "relate not to commerce but rather to the

opportunity to utilize Alaska's natural resources." App. 20a-21a. The court likewise distinguished *Camps Newfound* by noting that this Court had likened the charitable camp there at issue to a hotel, which the Alaska Supreme Court viewed as "a sufficient distinction from commercial fishing licenses and permits to allay concerns about the constitutionality of the fee differential." App. 22a. The court offered no further analysis than that. In a footnote, the court declared that, even if Alaska's fee differential implicated the Commerce Clause, it would nevertheless satisfy this Court's rigorous compensatory tax jurisprudence, citing *Fulton Corp.*, 516 U.S. at 331. App. 21a n.78. *But see* App. 68a & n.16.

The Alaska Supreme Court then reviewed the components of the state's fisheries budget approved by the Superior Court and the calculation of the percentage of the state budget derived from oil revenues. App. 27a-37a. The Alaska Supreme Court found no clear error in the Superior Court's determination that the "direct and indirect operating expenditures" calculated by the state should be included in the fisheries budget. App. 29a. The court also agreed with the Superior Court that categories of costs described by the state as "general governmental expenditures" and "foregone revenues" from commercial fishery resources cannot be included. App. 31a-33a, 34a-35a. However, the court reversed the Superior Court's determination that "capital costs" directly supporting the commercial fishing industry and the state's "hatchery loan fund subsidy" should be excluded from the fisheries budget. App. 33a-34a. *Carlson III* left "to the superior court on remand to determine whether proportionality exists [between Alaska residents' per capita contribution as calculated by the *Carlson II* formula and the fee differential imposed for a given year] and whether a refund is due." App. 26a.

## REASONS FOR GRANTING THE WRIT

This case presents important and far-reaching questions concerning the application and relationship of the Commerce

Clause and the Privileges and Immunities Clause. At issue here are discriminatory license fees that favor state residents over nonresidents who seek to pursue their trade in the licensing state, and the constitutional limitations on a state's ability to assess such discriminatory fees.

Alaska requires all commercial fishermen to purchase licenses and permits to fish in Alaska's territorial waters. Nonresidents are required to pay at least three times as much as residents. Despite this facially discriminatory surcharge, the Alaska Supreme Court held that higher costs charged to out-of-state residents for *commercial* fishing licenses do not even implicate the Interstate *Commerce* Clause. It concluded that Alaska's discriminatory commercial-fishing-license scheme warrants scrutiny only under the Privileges and Immunities Clause, and that the overcharge of nonresidents is permissible under that Clause so long as it does no more than compensate the state for fisheries-related expenditures made from revenues to which only state residents contribute.

Although it expressly refused to apply the Commerce Clause to Alaska's fee differential, the Alaska Supreme Court selectively borrowed the Commerce Clause's "compensatory tax" doctrine to justify imposing higher fees on nonresidents; even so, it refused to apply the rule of strict equality that is the essence of that doctrine. *See, e.g., Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

The *Carlson III* holding thus invites states to justify, under the rubric of the Privileges and Immunities Clause, patently discriminatory taxes and fees imposed disproportionately on nonresidents. If not reversed, the decision below would sanction, under the auspices of the Privileges and Immunities Clause, a plainly discriminatory tax on a commercial activity that could not possibly survive scrutiny under this Court's Commerce Clause jurisprudence.

## I. THE DECISION BELOW CONFLICTS WITH COMMERCE CLAUSE DECISIONS OF THIS COURT

### A. The Commerce Clause Applies Because Nonresident Commercial Fishermen Are Engaged In Interstate Commerce

The Alaska Supreme Court refused to analyze the discriminatory license-fee scheme under the Commerce Clause based on its cramped view that the Commerce Clause applies only to "the interstate flow of *articles of commerce*." *Carlson II*, 919 P.2d at 1340 (emphasis in original). The court distinguished between fee differentials "predicated upon the movement of articles of commerce across state lines" and those based on "the residency status of those applying for permits," believing only the former to be subject to the Commerce Clause. *Id.* That holding cannot be reconciled with precedent, nor with common sense.

Under the Commerce Clause, "commerce" is defined far more broadly than the Alaska Supreme Court acknowledged. In *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), this Court held that a charitable camp located in Maine that enrolled campers who resided in "all parts of the Nation" was engaged in interstate commerce: "The attendance of these campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'" *Id.* at 573. This holding was neither novel nor surprising: Over sixty years ago, in *Edwards v. California*, 314 U.S. 160 (1941), this Court declared it "settled beyond question that the transportation of persons is 'commerce,' within the meaning of" the Commerce Clause. *Id.* at 172. The nonresident fishermen who travel to Alaska to fish (and pay a disproportionate price for that privilege) generate the same sort of interstate "commerce" as the campers in *Camp Newfound* and the indigent who traveled to California in *Edwards*.

Indeed, this Court has long recognized that commercial fishing is by its very nature an *interstate, commercial* enterprise:

> The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. . . . A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent.

*Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 285-86 (1977) (footnotes omitted) (citing the Commerce Clause decisions in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-39 (1949), and *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974)).

And because that interstate commercial enterprise depends upon access to natural resources, the Commerce Clause applies with particular force. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 533-34 (1978) ("the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce."); *Camps Newfound*, 520 U.S. at 578 ("[b]y encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent"). The natural resource at issue here–Alaska's fishing waters and the fish that swim in them–is made available to Alaska residents on a far more favorable basis. And that favoritism impacts not

nonresidents' use and enjoyment of the state's fishing waters for recreation, *cf. Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388 (1978) (higher licensing fees imposed on nonresidents for recreational elk hunting license did not implicate category of rights protected by Privileges and Immunities Clause), but their access to the very resource upon which their commercial interests depend.

The Alaska Supreme Court's original holding to the contrary–that the Commerce Clause has no application to the discriminatory license fee–was apparently premised on the fact that the license and permitting fees are imposed prior to any fish being harvested. *See Carlson II*, 919 P.2d at 1340 n.8. That rationale, however, has been soundly discredited. The *Carlson* court's reasoning was derived from the Commerce Clause holding of *Toomer v. Witsell*, that a non-discriminatory South Carolina tax imposed on the taking of shrimp within the state's territorial waters did not violate the Commerce Clause because the taxable event–the taking of the shrimp–occurred before the shrimp "entered the flow of interstate commerce." 334 U.S. 385, 394-95 (1948). *Toomer*'s Commerce Clause holding, and the cases upon which that holding rested, *id.* at 394-95 n.22, including *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923); and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927), have long since been recognized as unsound. This Court has expressly disapproved "*Heisler* and its progeny" insofar as they suggest that the Commerce Clause has no application until an article of commerce has entered "the stream of interstate commerce." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614, 617 (1981). And the last vestiges of the rule that states could, without Commerce Clause limitation, freely tax certain purely local activities that occurred prior to the commencement of "interstate" commerce were eradicated in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

In short, the Alaska court's decision that the Commerce Clause has no application to Alaska's discriminatory fee

ignores the reality of the interstate commercial interests–the "interstate commerce"–directly affected by the state's licensing scheme. The discriminatory fee "impose[s] a disparate burden on any [nonresident] competitors" who travel to Alaska to fish in the state's commercial fisheries. *Pharm. Research & Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855, 1871 (2003). And it is precisely such discriminatory measures protective of local commercial interests at the expense of nonresident competitors that the Commerce Clause forbids.

### B. The Commerce Clause Applies To Discrimination Based On Residency

In holding that discrimination based on residency simply is not cognizable under the Commerce Clause, the Alaska Supreme Court boldly announced that this Court has instead "consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses." *Carlson II*, 919 P.2d at 1340-41. While the Privileges and Immunities Clause is of course implicated when states discriminate on the basis of residency, this Court has long recognized that the Commerce Clause also reaches such discrimination where interstate commerce is involved: "The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *see also Walling v. Michigan*, 116 U.S. 446 (1886) (tax imposed only on nonresidents selling liquor in the state violated the Commerce Clause).

The Alaska Supreme Court's error is borne out by the fact that none of the decisions it cited (App. 62a-63a & n.10) even suggest that discrimination against *commercial* interests based on residency is not cognizable under the Commerce Clause. The wholly discredited Commerce Clause holding of *Toomer v. Witsell* did not relate to the higher license fees

imposed on nonresidents that were at issue in that case, but rather to a wholly separate and nondiscriminatory tax on the taking of shrimp. 334 U.S. at 394. In *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 213 (1984), a municipal resident hiring preference was not subject to the Commerce Clause because Camden was acting as a market participant; absent that fact, the Commerce Clause would have applied. In *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), the parties did not raise a Commerce Clause challenge to an Alaska hiring law giving a preference to state residents. *Sosna v. Iowa*, 419 U.S. 393 (1975), concerned residency limitations on a state court's divorce jurisdiction; no commercial interests were advanced. And *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978), involved recreational, not commercial, hunting, and the nonresident plaintiffs raised no Commerce Clause challenge.

It is of course true that the Privileges and Immunities Clause protects the right of a citizen of one state to enter another state for the purpose of engaging in lawful commerce. *See, e.g., Hicklin,* at 524 (noting body of "decisions holding violative of the [Privileges and Immunities] Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State."); *Baldwin*, 436 U.S. at 383 (citing *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449 (1871)); *United Bldg. & Const. Trades Council*, 465 U.S. at 219. That principle applies equally where, as here, pursuit of the common calling depends upon access to natural resources found within the state: "[A] State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." *Baldwin*, 436 U.S. at 386 (citing *Toomer*, 334 U.S. 385).

When a common calling involves *interstate* as opposed to purely intrastate commerce, however, there is no basis for

concluding that the Commerce Clause is not also implicated. While the Privileges and Immunities Clause and the Commerce Clause "have different aims and set different standards for state conduct," *United Bldg. & Constr. Trades Council*, 465 U.S. at 220 ("It is discrimination against out-of-state residents on matters of fundamental concern which triggers the [Privileges and Immunities] Clause, not regulation affecting interstate commerce."), nothing in the Court's jurisprudence precludes the application of both clauses when *both* concerns–a regulation that both affects "matters of fundamental concern" and impacts interstate commerce–are implicated. Indeed, just last Term in *Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142 (2003), this Court held that claims by nonresidents challenging California's milk pricing and pooling regulations are cognizable under *both* the Commerce Clause and the Privileges and Immunities Clause. This of course is appropriate, given "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause–a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Hicklin*, 437 U.S. at 531-32 (footnote omitted); *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 & n.8 (1985).[5]

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[5] As the Alaska Supreme Court noted (App. 63a n.11), the Ninth Circuit struck down an earlier version of Alaska's discriminatory commercial-fishing-license scheme under the Commerce Clause. *Anderson v Mullaney*, 191 F.2d 123 (9th Cir. 1951). This Court affirmed the unconstitutionality of the discriminatory license scheme on Privileges and Immunities Clause grounds without reaching the Ninth Circuit's Commerce Clause holding. *Mullaney v. Anderson*, 342 U.S. 415 (1952). The Ninth Circuit's Commerce Clause holding therefore remains intact and conflicts with the Alaska Supreme Court's holding that the Commerce Clause has no application to such discriminatory license fees.

The flaw in the Alaska Supreme Court's reasoning becomes apparent when it is applied to a slight factual variation: If the applicant for a commercial fishing license were an out-of-state corporation (which employs individual fishermen and pays the Alaska license fees on behalf of its employees) rather than an individual, the Privileges and Immunities Clause, which protects only "citizens," would have no application. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-82 (1868), *overruled in part on other grounds*, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). But the Commerce Clause surely would protect the National marketplace against such patent local favoritism. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). It is unfathomable that the Commerce Clause would not be implicated (and violated) by such obvious favoritism.

## II. THE DECISION BELOW AUTHORIZES DISCRIMINATION THAT NONE OF THIS COURT'S DECISIONS WOULD COUNTENANCE

The Alaska Supreme Court, extrapolating from a fragment of a dictum in *Toomer v. Witsell*, endorsed under the Privileges and Immunities Clause a surcharge imposed solely on nonresidents that could not possibly pass Commerce Clause muster. The court justified that surcharge on the ground that it "equalizes" expenditures made from Alaska's general revenues. Even if the decision below were correct that only the Privileges and Immunities Clause applies, which Petitioners dispute, *see* Part I, *supra*, just as this Court has prohibited states under the Commerce Clause from shifting to nonresidents "charges purportedly included in general forms of intrastate taxation . . . anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds," *Oregon Waste*, 511 U.S. at 105 n.8, so too Alaska should be precluded from shifting such general costs of state government to nonresidents under the Privileges and Immunities Clause.

### A. The *Carlson* Formula Authorizes A Compensatory Tax That Would Violate The Commerce Clause

*Carlson II* approved a formula for determining whether the "differential in fees charged residents and nonresidents was sufficiently related" to the state's asserted goal of "equalizing the burden of fisheries management" to justify the disparate treatment. App. 64a. According to *Carlson II*, the nonresident fee differential is allowable under the Privileges and Immunities Clause so long as the amount of the differential does not "substantially exceed" each Alaska resident's per capita contribution (via expenditures from the state's oil revenues, *see* n.4, *supra*) toward the maintenance and operation of Alaska's fisheries, as calculated by the *Carlson II* formula, in any given year. App. 72a-73a. While the description of the formula may seem complicated, it boils down to this: whether nonresidents pay, through license and permit fees, roughly the same amount residents "contribute" through state oil revenues. The fee differential sanctioned by *Carlson II* thus operates in theory as a compensatory tax–that is, a tax "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp.*, 516 U.S. at 331 (citation omitted). But a compensatory tax is valid under the Commerce Clause–and, it should follow, under the Privileges and Immunities Clause–only if it satisfies this Court's strict test for substantial equality. The Alaska surcharge plainly does not.

This Court has acknowledged that "interstate commerce may be made to 'pay its way.'" *Oregon Waste*, 511 U.S. at 102 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 281). A state's ability to exact from nonresidents a "fair share" of the state's costs related to a particular transaction or course of commerce is, however, subject to "the strictest scrutiny," *Oregon Waste*. 511 U.S. at 100-01 (citation omitted), because

> permitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general

> forms of intrastate taxation "would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds."

*Id.* at 105 n.8 (quoting *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992)); *see also Fulton Corp.*, 516 U.S. at 335 (noting "the danger of treating general revenue measures as relevant intrastate burdens for purposes of the compensatory tax doctrine").

Accordingly, the Court has invalidated state laws imposing higher taxes on out-of-state commercial interests than those imposed on purely in-state commerce unless (1) the state identifies the specific intrastate tax burden for which it is attempting to compensate, (2) the tax on interstate commerce roughly approximates but does not exceed the tax on intrastate commerce, and (3) the in-state and out-of-state levies are imposed on substantially equivalent events. *Fulton Corp.*, 516 U.S. at 332-33 (invalidating state intangibles tax on corporate stock that authorized residents to take deduction equal to percentage of corporation's income subject to North Carolina income tax); *see also Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984) (invalidating gross receipts tax imposed on out-of-state wholesalers from which in-state manufacturers were exempt); *Oregon Waste*, 511 U.S. at 104-05. Under this strict test, "use taxes on products purchased out of state are the only taxes [the Court] ha[s] upheld in recent memory under the compensatory tax doctrine." *Id.* at 105; *see Henneford v. Silas Mason Co.*, 300 U.S. 577 (1987) (upholding tax on use of any article of tangible personal property within the state unless article had already been subject to state sales tax in an equal or greater amount; although tax was facially discriminatory, the combined effect of the sales and use taxes was to impose equivalent burdens on interstate and intrastate commerce).

The surcharge Alaska has imposed on out-of-state commercial fishermen ostensibly to "equalize" expenditures from the state's general oil revenues plainly fails under this Court's compensatory tax jurisprudence.

*First*, *Oregon Waste* makes clear that costs paid out of a state's general tax revenues cannot support the imposition of allegedly "equivalent" taxes on out-of-state commerce. In *Oregon Waste*, this Court rejected, on Commerce Clause grounds, an Oregon surcharge imposed on the disposal in Oregon of waste generated in another state. The state defended the facial discrimination inherent in the surcharge by categorizing it as a "'compensatory tax' necessary to make shippers of [out-of-state] waste pay their 'fair share' of the costs imposed on Oregon by the disposal of their waste in the State." 511 U.S. at 102. This Court soundly rejected the state's attempted justification, noting that Oregon had not imposed "a specific charge" on the disposal of waste generated in-state for which the surcharge was intended to compensate. Instead, Oregon premised the surcharge on the theory that "intrastate commerce does pay its share of the costs underlying the surcharge through general taxation," *id.* at 104, a theory that the Court rejected as incompatible with the Commerce Clause. Indeed, this Court has repeatedly "decline[d] . . . to open such an expansive loophole in [its] carefully confined compensatory tax jurisprudence." *Oregon Waste*, 511 U.S. at 105 n.8. *Carlson*, however, opens precisely such a loophole, allowing the state to impose a discriminatory fee on out-of-state commercial fishermen to "compensate" for expenditures from the state's general revenues.

*Second*, this Court's compensatory tax jurisprudence requires that the purportedly compensating taxes "fall on substantially equivalent events." *See Fulton Corp.*, 516 U.S. at 338-39 (citing cases). While refusing to apply this test, the Alaska Supreme Court in *Carlson III* nevertheless claimed that the Alaska fee differential satisfied this rigorous equivalence requirement, because "the event being taxed,

namely the license to use state fisheries, is the same for residents and nonresidents." App. 21a n.78. This superficial analysis contradicts this Court's teachings. In *Oregon Waste*, the Court rejected the Oregon surcharge as a compensatory tax in part because "earning income and disposing of waste at Oregon landfills are even less equivalent than manufacturing and wholesaling," the taxable incidents compared in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). *Oregon Waste*, 511 U.S. at 105. Here, too, "the events being taxed" are not substantially equivalent: The tax on nonresidents falls on the privilege of fishing alone, but the state seeks to justify that higher tax on nonresidents by a *combination* of two "taxable events" for local residents–the lower cost of their fishing license, *plus* the local residents' alleged share of the monies generated by petroleum production. These are not "substantially equivalent events."

*Finally*, many discriminatory taxing schemes that states attempt to justify as "compensatory taxes," like the surcharge in *Oregon Waste*, fail for lack of proof that the tax is in fact a rough approximation of costs actually borne by state residents. *See, e.g., Fulton Corp.*, 516 U.S. at 336-38. Alaska's discriminatory surcharge is even further afield from the compensatory taxes that this Court rejected in *Oregon Waste* and *Fulton Corp.*, however, given that the "burden" supposedly borne by Alaska residents does not even involve the payment of taxes in the first place.

In evaluating whether a state is free to assess a "compensatory tax" against nonresidents in order to equalize a tax burden unfairly borne by state residents, it is significant that residents face a direct burden as a result of the obligation to contribute to the state's tax fund, from which general expenditures are made. *See, e.g., Henneford*, 300 U.S. at 579-80 (direct tax of two percent imposed on retail sales within the state). An individual (or, as in *Fulton Corp.*, a corporation) obligated to pay a tax on income "spends" personal funds in support of the state. No Alaska resident, however, makes such a contribution to Alaska's general

revenues, and none of the conservation (or other) expenditures cited by the state are made from "taxes which only residents pay," *Toomer*, 334 U.S. at 399, because Alaska does not impose an income tax on state residents. Instead, the expenditures the state seeks to recoup from nonresidents are made from "oil revenues" generated by petroleum production within the state, which has been the primary source of Alaska's revenues. *See, e.g.*, App. 106a (in fiscal year 1986, 86 percent of state revenues derived from oil production). *Carlson I* nevertheless proclaimed the state's oil revenues to be "analytically equivalent" to taxes paid only by state residents, without further analysis. App. 106a. In effect, the Alaska Supreme Court has allowed the state to use its natural oil bounty, the proceeds from which are themselves reserved for the residents of Alaska, as a justification for further, illegal favoritism of its own residents with respect to the state's natural bounty in fish.

In treating expenditures from state oil revenues as tantamount to expenditures from state income tax revenues–because Alaska residents "pay proportionately more by way of foregone benefits then nonresidents for fisheries management," *id.*–the Alaska Supreme Court vastly expanded the reach of, and the justification for, the compensatory tax doctrine. The Alaska Supreme Court's analysis would allow virtually any tax to be imposed disproportionately on nonresidents: Following the *Carlson* reasoning, *any* expenditure from a state's general revenues, whether or not derived from taxes imposed directly on residents, can be offset by imposing a "compensatory" tax or fee on any nonresident who seeks access to any resource or service located in or provided by the state.

In short, although it explicitly disclaimed any intent to authorize the imposition of a "compensatory tax" upon nonresident commercial fishermen, App. 66a, close analysis reveals that the Alaska Supreme Court has done precisely that, but without any of the rigorous limits this Court has imposed on application of the doctrine. The Alaska court

sanctioned under the Privileges and Immunities Clause precisely the sort of generalized tax-shifting that *Oregon Waste* prohibited under the Commerce Clause, on the theory that the fee differential does nothing more than "impos[e] on nonresidents their share of the costs of commercial fisheries," thereby "balanc[ing] out 'any conservation expenditures from taxes which only residents pay.'" App. 66a (quoting *Toomer*, 334 U.S. at 399). Semantics do not disguise the fact that Alaska has done what *Oregon Waste* forbids. If the Alaska license fee system is constitutionally permissible as a "compensatory fee," there are no real limits on surcharges a state may impose on nonresidents in the name of equalizing expenditures from the state's general revenues.

### B. The *Carlson* Formula Sanctions A Discriminatory Fee That *Toomer* Does Not Authorize

The *Toomer* dictum can be read to crack an exceedingly narrow window under the Privileges and Immunities Clause for nonresident fee differentials that do no more than "compensate the state for any added enforcement burden [nonresidents] may impose or for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399. In light of the *Toomer* dictum and similar language with respect to the Commerce Clause in *Oregon Waste*, *see* 511 U.S. at 102, it is possible that perfect equality of treatment of nonresidents is not mandated by the Constitution, but that states may take into account limited enforcement and conservation expenses when imposing fees on nonresidents. Yet the Alaska Supreme Court's rationale for upholding the state's nonresident fee differential, which was imposed without reference to any such costs (and in the absence of any "taxes" paid by residents), would vastly expand upon *Toomer* and would permit far more discrimination than absolutely necessary to compensate the state for any additional "enforcement burden" generated by nonresidents or "conservation expenditures" from state funds. In fact, Alaska has conceded that nonresident

commercial fishermen do not impose any greater costs on the state than do residents. *See State of Alaska v. Carlson*, No. S-10091/10101, Joint Excerpt of Record on Appeal at 119 (Alaska Supreme Ct., filed Sept. 17, 2001).

Most alarmingly, the Alaska court's approach would allow a state to shift to nonresidents a wide range of generalized costs of state government–a result plainly prohibited by this Court's compensatory tax cases, *see supra* pp. 20-21; *Oregon Waste*, 511 U.S. at 105 n.8, and clearly beyond the extraordinarily limited category of "enforcement" and "conservation" expenditures that the Privileges and Immunities Clause allows to be taken into account, *Toomer*, 334 U.S. at 399. The decision below invites such *post hoc* accounting abuses, as a limitless array of costs can be (and has been) characterized as sufficiently related to a particular state program or service to warrant inclusion in the category of costs shifted to nonresidents. Here, Alaska seeks to pass along to nonresident commercial fishermen far more than the costs of any "added enforcement burden" imposed by the presence of nonresidents in the state's commercial fisheries (Alaska has cited none) or even "conservation expenditures" made from Alaska's revenues. *Toomer*, 334 U.S. at 399. The Alaska Supreme Court reasoned that the appropriate calculation instead derives broadly from "what the State spends from its general funds on its commercial fisheries." App. 27a.

Relying upon that expansive premise, Alaska included in its submission to the court significant components that can only be described as general costs of state government, such as "mechanical inspection[s]" performed by the Department of Labor, occupational safety inspections, and legal costs associated with "statehood defense/federal relations" and "Environmental-Exxon Valdez." App. 127a. Indeed, Alaska's breakdown of its fisheries expenditures includes such all-encompassing categories as "Public Safety-Administration Services" and "Community & Regional Affairs-Community Development Quota Program." App.

127a-128a. The state also included costs of the Department of Fish and Game attributable to "sport fish," App. 128a, a recreational category that by definition should not be charged to *commercial* fishermen. And the state's budget includes "shared fish taxes," *see* Alaska Stat. §§ 43.75.015, 43.75.130, which are business taxes collected by the state from fish processors and then passed through to municipal governments for general uses. App. 128a. In fact, these broad categories of costs are now enumerated in the permit fee statute, which notes that nonresident permit fees may reflect, among other things, "the "direct operating expenditures" of a variety of state agencies and institutions including the Office of the Governor, the Department of Community and Economic Development, the Department of Labor, the Alaska court system, and others, and "capital expenditures to support the commercial fishing industry as measured by annual depreciation of public facilities and infrastructure." Alaska Stat. § 16.43.160(e) (App. 118a-120a).

The state has been given such leeway in calculating its fisheries budget that it can–and perhaps did–include costs directly related to this very litigation (under such broad categories as "Law/Civil" or "CFEC"). The costs to the state of preparing the accounting used to calculate the state's fisheries budget may also be included within the broad categories of fisheries-related legal or administrative costs the state seeks to pass along to nonresidents. In essence, the state could shift a portion of its legal fees to the very class of nonresident fishermen who challenged the discriminatory fee that prompted this case. Such a perverse result cannot be intended by the *Toomer* dictum.

There is no hint in *Toomer* (much less in the Court's compensatory tax cases) that the constitutionality of a facially discriminatory fee turns on this sort of line-item accounting of every conceivable general cost associated with the operation of Alaska's commercial fisheries, much less a *post hoc* accounting prepared by the state and accepted

virtually wholesale by the courts. This Court has made clear that "[c]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations." *Mullaney*, 342 U.S. at 418. The open-ended invitation to Alaska to define and calculate its fisheries budget encouraged the state to inflate its fisheries-related costs (in ways the Alaska legislature never considered) to justify the substantial differential. Indeed, under the *Carlson* formula, Alaska can attempt to impose a fee differential greater than the current three-to-one surcharge, so long as the state can assemble a sufficiently large "fisheries budget" after the fact. The potential for abuse–at the expense of out-of-state commercial interests–is virtually limitless.

The Alaska Supreme Court erred by failing to recognize that, apart from the specific "enforcement" and "conservation" expenditures discussed in *Toomer*, the Privileges and Immunities Clause does not sanction the expansive cost-shifting approved by the court below. When a state defends a facially discriminatory fee on the ground that it compensates for a variety of expenditures from general revenues that otherwise would be borne by state residents alone, this Court's compensatory tax jurisprudence provides the appropriate analytical framework–and requires strict equality of treatment of residents and nonresidents.

## III. THE DECISION BELOW RAISES SIGNIFICANT CONSTITUTIONAL QUESTIONS WITH NATIONWIDE CONSEQUENCES

Alaska's commercial fishing industry is vital, both within the state and to the Nation as a whole. "The commercial fishing industry is a major component of [the] statewide economy and the economic backbone of Alaska's fishing communities." Commercial Fisheries Entry Commission, 2001 Annual Rpt. at 1 ("2001 Annual Report"). Beyond the state's borders, fish caught in Alaska's waters account for *more than half* of the Nation's total commercial catch. In 2001, commercial landings–quantities of fish bought and

sold–at Alaskan ports slightly exceeded 5 billion pounds of fish, valued at $869.9 million; total commercial landings at all United States ports in 2001 were 9.5 billion pounds of fish with a value of $3.2 billion.[6] Thus, in 2001, commercial landings at Alaskan ports represented more than half of the total national catch of fish, in pounds, and almost 30 percent of the value of fish caught and landed at United States ports. Given the sheer size of the fish pool in Alaskan waters, it is not surprising that large numbers of nonresident commercial fishermen travel to Alaska to participate in its many fisheries.[7]

Alaska's prominent role in the Nation's commercial fishing industry makes the constitutional issues presented by this case all the more pressing: The state that controls many of the country's most abundant and profitable commercial fisheries has erected barriers to entry that favor local commercial fishermen over nonresidents. And the discriminatory fee challenged here is hardly Alaska's first attempt to favor state residents over nonresidents. *See, e.g.*, *Anderson v. Mullaney*, 191 F.2d 123, 125 (9th Cir. 1951), *aff'd*, 342 U.S. 415 (1952) (striking down Alaska's imposition of $5 commercial-fishing-license fee on resident fishermen and $50 license fee on nonresidents); *Hicklin*, 437 U.S. at 533-34 (challenge to hiring preference law requiring the employment of Alaska residents in connection with oil and gas projects within the state); *Sheley v. Alaska Bar Ass'n*, 620 P.2d 640 (Alaska 1980) (striking down Alaska's rule requiring applicant for the Alaska bar to establish domicile in the state at least 30 days before bar examination

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[6] National Oceanic and Atmospheric Administration, *Fisheries of the United States*, at iv, vii, 6 (2001). The state with the next highest level of commercial landings in 2001 was Louisiana, with 1.2 billion pounds, less than one-fourth of the Alaska landings. *Id.*

[7] As of 2001, nonresidents held 4,910 of 23,339 permits issued by the State, a total of 21 percent. 2001 Annual Report, at 17.

under Privileges and Immunities Clause); *cf. Zobel v. Williams*, 457 U.S. 55 (1982) (Equal Protection challenge to Alaska Permanent Fund dividend distribution plan, which calculated amount of dividend based on length of time an individual resided in Alaska).

Although the Alaska legislature has been historically aggressive in acting to protect the state's residents against competition from outsiders, it is not alone: At present, 34 states (aside from Alaska) discriminate against nonresidents by imposing additional fees on them or by banning their access to commercial fishing altogether.[8] Allowing the

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[8] *See* Ala. Code § 9-12-80 (non-residents charged at least as much as their state charges non-residents but not less than twice as much as Alabama residents, unless the non-resident's state has entered into a reciprocity agreement with Alabama); Ark. Code Ann. § 002 00 001 41.13 (excluding nonresidents from commercial fishing activities, with exceptions for residents of Mississippi, Missouri and Tennessee, according to reciprocal agreements); Cal. Fish & Game Code § 7852 (non-resident crew members charged three times as much as residents; non-resident vessel operators charged sixty-six percent more than residents); Conn. Gen. Stat. § 26-142a (c) (non-residents charged fees ranging from thirty-three percent more to five times more than residents, depending on devices used); Del. Code Ann. tit. 7 § 914 (non-residents charged ten times more than residents, with exceptions for New Jersey residents fishing certain portions of Delaware River); Fla. Stat. Ann. § 370.06(2) (non-residents charged four times as much as residents for standard license and five times as much for special activity license); Ga. Code Ann. § 27-2-23 (non-residents charged more than ten times as much as residents); Idaho Code § 36-416 (non-residents charged twice as much as residents); 515 Ill. Comp. Stat. 5/20-45, 5/20-55 (non-residents charged more than four times as much as residents for licenses and twice as much as residents for each 100 yards of seine and each line, trap, or net device); Ind. Code Ann. § 14-22-14-6 (excluding non-resident individuals and corporations with non-resident shareholders); Iowa Code § 482.4 (non-residents charged twice as much as residents for licenses and each unit of gear; non-resident mussel fishers and mussel helpers charged twenty-five times and four times more, respectively, than residents); Kan. Admin. Regs. § 115-2-1 (non-residents charged more than twelve times as much as residents for commercial mussel fishing

licenses); 301 Ky. Admin. Regs. 3:022 (non-residents charged nearly five times as much as residents); La. Rev. Stat. Ann. § 56:303 (non-residents charged more than eight times as much as residents); Me. Rev. Stat. Ann. tit. 12, § 6501 (non-residents charged ten times as much as residents); Md. Code Ann., Natural Resources § 4-701 (non-residents charged twice as much as residents as well as surcharge of either $350 or the difference between total fees charged Maryland residents for like activities in applicant's domicile state and total fees charged applicant in Maryland, whichever is greater); Mich. Comp. Laws § 324.47330(2) (non-residents charged five times as much as residents); Minn. Stat. Ann. §§ 97A.461, 475 (nonresidents excluded from commercial fishing); Miss. Code Ann. §§ 49-15-80, 49-15-30 (non-residents charged four times as much as residents, except that residents of other states bordering on Gulf of Mexico charged same fees as their domicile states charge Mississippi residents in order to promote reciprocal arrangements); Mo. Code Regs. tit. 3, § 10-10.720 (non-residents charged eight times as much as residents); Neb. Rev. Stat. § 37-4, 104 (non-residents charged two times as much as residents); N.J. Stat. Ann. § 23:5-24.2 (non-residents charged ten times as much as residents, unless their domicile state charges New Jersey residents the same amount as residents for a similar license); N.Y. Comp. Codes R. & Regs tit. 6, § 35.1 (d) (non-residents charged ten times as much as residents); N.C. Gen. Stat. § 113-168.2 (non-residents charged four times as much as residents or amount equal to the non-resident fee charged by non-resident's state, whichever is less, but in no event less than North Carolina resident's fee); N.D. Cent. Code, § 20.1-03-12 (non-residents charged four times more than residents for commercial frog licenses and ten times more for commercial clam licenses); Okla. Stat. Ann. tit. 29, § 4-103 (non-residents charged more than twice as much as residents); Or. Rev. Stat. § 508.285 (non-residents charged twice as much as residents); 30 Pa. Cons. Stat. § 2903 (b) (5) (non-residents charged two times as much as residents); R.I. Gen. Laws §§ 20-2.1-5, 20-2.1-6 (non-residents charged four times as much as residents); S.C. Code Ann. §§ 50-5-300, 50-5-310 (non-residents charged twelve times as much as residents); Tenn. Code Ann. § 70-2-205 (non-residents charged four times as much as residents for fishing only and six times as much for mussels only); 31 Tex. Admin. Code § 53.6 (non-residents charged four times as much as residents); 4 Va. Admin. Code §§ 20-730-20, 20-920-30 (non-residents charged additional $350 per vessel); Wash. Rev. Code Ann. §§ 77.65.160, 77.65.200 (non-residents charged eighty percent more than residents for limited entry salmon

decision below to stand will only encourage states to engage in impermissible economic protectionism.

* * * * *

"In its negative aspect, the Commerce Clause prohibits economic protectionism–that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp.*, 516 U.S. at 330. Alaska's discriminatory nonresident commercial-fishing fee does just that: It ensures that state residents who make their living as commercial fishermen need not face the degree of competition from nonresidents engaged in the same commercial endeavors that would prevail in a completely free market. That Alaska expressly bases its surcharge on residency makes undeniable the state's intent to protect its residents from out-of-state competition. Such a facially discriminatory law should be held unconstitutional under *both* the Commerce and the Privileges and Immunities Clauses.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

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licenses and fifty to sixty percent more for other species, gear, or area licenses); Wis. Stat. §§ 29.523-537 (nonresidents excluded from commercial fishing).

Respectfully submitted,

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July 11, 2003

# APPENDIX

65 P.3d 851

Supreme Court of Alaska.

**STATE of Alaska, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellant/Cross-Appellee,**

**v.**

**Donald H. CARLSON; Warren Hart; Gerard Haskins; Earl Weese; and Lyla C. Weese, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Appellees/Cross-Appellants.**

**Nos. S-10091, S-10101.**

March 14, 2003.

Before: FABE, Chief Justice, MATTHEWS, EASTAUGH, BRYNER, and CARPENETI, Justices.

***OPINION***

FABE, Chief Justice.

## I. INTRODUCTION

This is the third appeal arising out of a lawsuit centering on whether Alaska can charge nonresidents more for commercial fishing licenses than it charges resident commercial fishers. The case is brought as a class action by a group of nonresident commercial fishers. In previous rulings in this case, we held that different rates can be charged for resident and nonresident commercial fishers, and we derived a formula for calculating the acceptable difference. The components of this formula, including various budget expenditures and oil revenues, are in dispute in this appeal. We conclude that direct and indirect costs associated with the fisheries budget and costs associated with the

hatcheries loan fund can be included in the calculation of the allowable fee differential. We further hold that at an earlier stage in this litigation the State conceded that the protest requirement for recovery of overpayment of taxes has been satisfied. Finally, we hold that prejudgment interest will be applicable if on remand it is determined that a refund of a portion of fees is required.

## II. FACTS AND PROCEEDINGS

Litigation in this case began in 1984. At the time this case was first before this court, nonresident commercial fishers were charged three times as much as resident fishers for fishing license fees.[1] The relevant statute at the time, AS 16.05.480(a), dealt primarily with authorizing the establishment of fees for commercial fishing: "A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents." The relevant current statute, AS 16.05.480(h), establishes: "For a crewmember fishing license[2] issued for calendar year 2002 and following years, a nonresident engaged in commercial fishing who is 11 years of age or older and who does not hold an entry permit or an interim-use permit shall pay an annual base fee of $60 plus an amount, established by the department by regulation, that is as close as is practicable to the maximum allowed by law." The principal difference is that the current statute does not set the amount

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[1] *Carlson v. State, Commercial Fisheries Entry Comm'n* (*Carlson I*), 798 P.2d 1269, 1270 (Alaska 1990).

[2] "Crewmember fishing license" and "commercial fishing license" are used interchangeably in AS 16.05.480 with no apparent distinction made between the two. A "commercial fisherman" is elsewhere defined to include crewmembers. AS 16.05.940(4).

which nonresidents can be charged, but rather allows this amount to be set at the maximum legal amount.[3]

A similar fee structure is established for entry permits and interim-use permits where the creation of limited use zones is deemed necessary for controlling, through the permitting process, the number of people who can fish in a given geographic area.[4] However, in 2001 the fees for nonresidents were three times the amount for residents.[5] Crewmembers are not required to have

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[3] This amount is to be set by the Alaska Commercial Fisheries Entry Commission. AS 16.43.100(16) (authorizing commission to "establish reasonable user fees for services").

[4] *See generally* AS 16.43.200-225.

[5] The relevant sections of former 20 Alaska Administrative Code (AAC) 05.240(a) (1), (2), (4) (2002) provide:

(a) For 2001, the commission will determine the annual fee for the issuance or renewal of an entry permit or interim-use permit according to the following:

(1) the resident annual fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is .25 percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection; the non-resident annual fee is three times this amount, as set out in (4) of this subsection; ...

(2) the resident annual fee for the issuance or renewal of an interim-use permit in an unlimited fishery is .25 percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection; the non-resident fee is three times this amount, as set out in (4) of this subsection;

....

(4) the resident and non-resident annual fees are:

| FEE CLASS | ANNUAL FEE | |
|---|---|---|
| | Resident | Non-resident |

entry or interim-use permits, although they are required to have a commercial (crewmember) fishing permit to work on a permit vessel.[6] The class never specifically stated in its brief that it is challenging both commercial fishing licenses and entry permit fees, but one of the challenged superior court orders states that it applies to both "commercial licenses and limited entry permits." Furthermore, *Carlson I* defined the class as consisting of "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the

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| | | |
|---|---|---|
| I | $250 | $750 |
| II | 200 | 600 |
| III | 150 | 450 |
| IV | 100 | 300 |
| V | 50 | 150 |

[6] *See* AS 16.43.140(b) ("A permit is not required of a crewmember or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear."); AS 16.05.480(a) (2001) ("A person engaged in commercial fishing shall obtain a commercial fishing license and shall retain the license in possession and readily available for inspection during fishing operations. An entry permit or interim-use permit entitles the holder to participate as a gear operator in the fishery for which the permit is issued and to participate as a crewmember in any fishery."); AS 16.05.940(4) (" '[C]ommercial fisherman' means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise."); AS 16.05.940(5) (" '[C]ommercial fishing' means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels.").

State for commercial or gear licenses or permits."[7] This language was taken directly from the initial complaint. We therefore find it appropriate to address both commercial fishing licenses and entry permit fees. For the sake of simplicity, the two will be referred to collectively as "commercial fishing fees," except in those instances where it is necessary to differentiate between the two.

### A. Prior Case History Before the Alaska Supreme Court

Before proceeding with the issues in the present case, it is helpful to review the decisions in the previous appeals before this court. In *Carlson I,* we held that different fees for residents and nonresidents did not automatically violate either the Privileges and Immunities Clause or the Commerce Clause of the United States Constitution.[8] We noted that "[l]ess favorable treatment by the state towards nonresidents runs afoul of the Privileges and Immunities Clause if: 1) the activity in question is 'sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the [clause], *and* 2)[it] is not closely related to the advancement of a substantial state interest.'"[9] We proceeded to determine that "[c]ommercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are *prima facie* a violation of it."[10] We recognized that states may "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes

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[7] *Carlson I,* 798 P.2d at 1270.

[8] *Id.* at 1274-78.

[9] *Id.* at 1274 (quoting *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 64-65 (1988) (citations omitted)).

[10] *Carlson I,* 798 P.2d at 1274.

which only residents pay."[11] Because the appropriateness of a 3:1 fee differential had not been addressed, we remanded the case for such a determination, placing the burden of persuasion on the State.[12]

We conducted a similar analysis with regard to the Commerce Clause. Noting that the Commerce Clause "limits the power of the States to erect barriers against interstate trade,"[13] we concluded that if a law is shown to discriminate against interstate commerce, either in its wording or in its effect, the burden is on the State "to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."[14] We held that the superior court improperly relied upon *Salorio v. Glaser*[15] in granting summary judgment to the State.[16] We determined that applying *Salorio,* in which New Jersey imposed additional fees on nonresidents to pay for transportation facilities,[17] to the present case would result in nonresidents subsidizing the activities of residents because nonresidents could then be required "to pay up to 100% of their *pro rata* share of expenditures regardless of what percentage of their *pro rata* share residents are in fact paying."[18] However, because the majority of the state revenues are derived from petroleum production, a source to which

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[11] *Id.* at 1274-75 (quoting *Toomer v. Witsell,* 334 U.S. 385, 399 (1948)).

[12] *Carlson I,* 798 P.2d at 1276, 1278.

[13] *Id.* at 1277 (quoting *Maine v. Taylor,* 477 U.S. 131, 137 (1986)).

[14] *Carlson I,* 798 P.2d at 1277 (quoting *Maine v. Taylor,* 477 U.S. at 138).

[15] 82 N.J. 482, 414 A.2d 943, *cert. denied,* 449 U.S. 874 (1980).

[16] *Carlson I,* 798 P.2d at 1278.

[17] 414 A.2d at 953.

[18] *Carlson I,* 798 P.2d at 1278.

nonresident fishers make no contribution, we ruled that the State could recoup conservation expenditures from nonresidents in the form of differential fees.[19] We reasoned that the oil revenues spent on conservation "could have been used to benefit residents through various other programs and they are, analytically, equivalent to 'taxes which only residents pay.'"[20] In that the extensive use of oil revenues as a source for state expenditures created a greater financial burden on nonresidents than residents, a fee differential based upon residency was justified.[21] Consequently, "the state may equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference."[22] This is the same conclusion that was reached in the Privileges and Immunities Clause analysis. Consequently, we remanded the case for a further determination of the appropriateness of the fees.[23]

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* We made two other rulings in *Carlson I:* We held that the Commercial Fisheries Entry Commission was authorized by statute to impose different commercial fishing fees, assuming that the ratio itself was constitutional. *Id.* at 1278-79. We also remanded on the issue of whether the protest requirement in AS 43.15.010(a) had been met. *Id.* at 1279-80. We further noted on this issue that a two-year statute of limitations from the time the tax was paid governed instead of the six-year limit assumed by the superior court. *Id.* at 1280.

In *Carlson II,* we addressed the question of what would be an acceptable fee differential for nonresidents to pay.[24] We first affirmed our decision in *Carlson I* that neither the Commerce Clause nor the Privileges and Immunities Clause prevented the imposition of an increased fee for nonresident commercial fishers.[25] The class had argued that two cases, which held that states violated the negative (also known as dormant) Commerce Clause by charging greater taxes on out-of-state waste than on in-state waste, decided by the United States Supreme Court after *Carlson I* but before *Carlson II,* were applicable to the present case.[26] We distinguished these two cases by holding that the facts in the present case did not involve the "interstate flow of *articles of commerce.*"[27] In response to the class's Privileges and Immunities Clause argument, we stated that we did not in *Carlson I* advance the type of fee-shifting arrangement denounced in *Oregon Waste Systems,* but rather explicitly held that nonresidents could be required to pay only that amount that would make their contribution to state-provided benefits substantially equal to the contribution of similarly situated residents.[28]

Accepting the constitutionality of the fee differences, we next determined a formula for allowable differences. We adopted the per capita fee differential formula advocated by the class as

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[24] *Carlson v. State, Commercial Fisheries Entry Comm'n* (*Carlson II* ), 919 P.2d 1337 (Alaska 1996). Certiorari was subsequently requested but denied. 519 U.S. 1101 (1997).

[25] *Id.* at 1340-42.

[26] *Carlson II,* 919 P.2d at 1340 (citing *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994); *Chemical Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 340-41, (1992)).

[27] *Carlson II,* 919 P.2d at 1340 (citing *Oregon Waste Sys.,* 511 U.S. at 98).

[28] *Carlson II,* 919 P.2d at 1340.

opposed to the pro rata formula offered by the State, holding that the allowable fee differential could be determined by: (Fisheries Budget/Alaska Population) X (percentage of State Budget from oil revenues/1.0).[29] We rejected the State's proposed formula[30] because it improperly compared the contributions made by nonresident commercial fishers to those made only by resident commercial fishers, rather than viewing the resource expenditures benefitting the nonresidents in terms of the population of the state as a whole:[31]

Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis.[32]

We remanded the case to the superior court to determine if, under the formula adopted, the nonresident fee differential exceeded the resident contribution, including the forgone oil

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[29] *Id.* at 1342-43.

[30] The State had advocated the following pro rata formula: "(1) calculate the expenditures or costs of the commercial fisheries (enforcement and conservation); (2) determine the resident and nonresident commercial fishers' respective *pro rata* shares of those expenditures; and (3) compare the percentage of its respective *pro rata* share each group is paying." *Id.* at 1343.

[31] A similar plan was rejected by the Fourth Circuit, which overturned a Virginia law that required all fishers to pay a fee determined by dividing the state costs of fishing funded by all taxpayers by the number of fishers in the state, requiring as a result that nonresident fishers pay an additional $1,150 fee. *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 268 (4th Cir.1993).

[32] *Carlson II*, 919 P.2d at 1343.

revenues of the average Alaska resident.[33] The superior court on remand was also to address what budget figures should be included in executing the formula.[34]

On the issues of refunds to the class and prejudgment interest, we recognized that "the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210."[35] The class admitted that it could not have satisfied the protest requirement before then and thus would not seek a refund for any fees prior to that date.[36] We remanded the case to determine if the action of filing suit constitutes sufficient notice to satisfy the requirements of AS 43.10.210(a)[37] and to determine whether, if the class ultimately prevails, prejudgment interest is due.[38]

### B. Recent Case History After Remand to the Alaska Superior Court

On July 17, 1998, Superior Court Judge Peter A. Michalski issued an opinion addressing class decertification and prejudgment interest. Judge Michalski denied the State's motion

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[33] *Id.* at 1344.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] The statute provides: The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax; or (2) in the absence of a judgment, it is obvious to the Department of Revenue that the taxpayer would obtain judgment if legal proceedings were prosecuted by the taxpayer.

[38] *Carlson II,* 919 P.2d at 1344.

for class decertification because all four components of class certification– numerosity, commonality, typicality, and adequacy of representation–were met. The State had argued that because the class shifted its legal theory from common law theories of assumpsit to a statutory argument, the original class certification under Alaska Civil Rule 23(b) (2) must be reexamined. The State further argued that numerosity did not exist because only the named parties actually protested the fee differential; conceded that commonality existed; asserted that because different permits and fees were involved, there was no typicality of claims; and contended that the variety of remedies that the legislature could adopt if the fees were found to be unconstitutional rendered it impossible for there to be adequacy of representation. The superior court held that the State did not provide a sufficient change in circumstances to justify decertifying the class and noted that speculation as to how the legislature might react to a ruling was also not grounds for decertification. Judge Michalski further ruled that the status of a class as a "unified legal entity" overrode the State's interest in making distinctions between class members. Consequently, the superior court concluded that "no distinctions will be made among class members when determining whether the state waived the protest requirement or whether the class met the protest requirement."

In addition, the superior court held that notice to the State existed as of December 13, 1984. The State had argued that every member of the class was required to protest to obtain any refund. However, Judge Michalski, quoting *Principal Mutual Life Insurance v. State, Division of Insurance,*[39] stated that the purpose of the protest requirement was to provide the State "with notice of the claimed tax illegality, the grounds advanced in support of the claimed illegality, and [to] afford[ ] the state the

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[39] 780 P.2d 1023, 1030-31 (Alaska 1989).

opportunity to fashion budget appropriations, or expenditures, taking into account the magnitude of the claimed tax illegality." Because the class was defined extensively enough to include all commercial license and permit holders, Judge Michalski held that the State should have known the magnitude of the potential claims and budgeted appropriately. It was therefore not necessary for each class member to protest the fee differential because to impose such a requirement would be a mere technicality. Judge Michalski thus held that the protest requirement of AS 43.10.210(a) was satisfied by the certification of the class in the suit.

As to prejudgment interest, the State asserted that AS 45.45.010, which had been invoked in *Carlson II* as the basis for a determination of whether prejudgment interest was due,[40] only set the maximum interest rate and did not specifically authorize prejudgment interest. The superior court conceded that the State's interpretation of AS 45.45.010 was correct, but concluded that this court intended the superior court to look beyond just that statute in addressing the issue of prejudgment interest. Looking to AS 43.05.280, the superior court determined that interest was allowed on an overpayment of taxes. Because we held in *Carlson I* that Title 43 applied to the present case even though fees, and not taxes, were involved,[41] Judge Michalski held that the class could recover prejudgment interest on their overpaid commercial fishing fees were they ultimately to prevail on their claim.

Left undecided was the issue of what comprised the different components of the formula derived in *Carlson II*. This was resolved by the superior court at an evidentiary hearing held

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[40] 919 P.2d at 1344.

[41] 798 P.2d at 1280.

June 12-14, 2000. The court adopted the State's methodology for computing the fisheries budget with regard to both direct and indirect operating expenditures, but agreed with the class that general government costs, capital costs, the hatcheries loan fund subsidy, and forgone revenue from fishery resources could not be included when computing the fisheries budget. The resulting fisheries budget for fiscal year 1996 was $127,289,000. Both sides agreed on the methodology for determining Alaska's population, namely the yearly estimate made by the Alaska Department of Labor, yielding a state population of 605,212 in fiscal year 1996. The superior court agreed with the State that the oil revenues component should "include general fund petroleum revenues, the draw on the constitutional budget reserve, and the net income from the Alaska Permanent Fund appropriated each year." In fiscal year 1996 this resulted in a calculation that seventy-four percent of the state budget came from oil revenues. From these figures, a maximum fee differential of $155.64 was calculated for fiscal year 1996. The parties were then ordered to use the methodologies adopted by the superior court to calculate the allowable fee differential back to December 13, 1984 and any corresponding refund that may be necessary. This accounting has not yet been made. The State appealed and Carlson cross-appealed.

## III. STANDARD OF REVIEW

The constitutionality of a statute and matters of constitutional or statutory interpretation are questions of law to which we apply our independent judgment.[42] We adopt the rule of law "that is most persuasive in light of precedent, reason, and policy."[43]

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[42] *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 535 (Alaska 2002); *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

[43] *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001) (quoting *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

Findings of fact are reviewed for clear error,[44] a standard that requires that great deference be given to the findings of the superior court.[45]

## IV. DISCUSSION

### A. We Decline To Readdress the Constitutional Issues Already Raised and Resolved in *Carlson II.*

The constitutionality of charging nonresidents more for commercial fishing licenses and permits has already been addressed, first in *Carlson I*[46] and then reaffirmed in *Carlson II*.[47] Whether we should readdress the issue here is a threshold question. In *Pratt & Whitney Canada, Inc. v. Sheehan,* we noted the importance of stare decisis but also recognized the

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[44] *See Vezey v. Green,* 35 P.3d 14, 19-20 (Alaska 2001) (citations omitted) ("We review the trial court's findings of fact under the clearly erroneous standard. Under this standard, we will reject a factual finding only if we are 'left with the definite and firm conviction on the entire record that a mistake has been committed.' In addition, we have stated that '[w]hen a trial court's decision of a factual issue depends largely on conflicting oral testimony, the trial court's competence to judge credibility of witnesses provides even a stronger basis for deference by the reviewing court.'"); *see also Rockstad v. Global Fin. & Inv. Co., Inc.,* 41 P.3d 583, 586 (Alaska 2002) ("[W]hen the trial court relies on extrinsic testimonial evidence to provide a factual basis for its interpretation of a contract, we apply the clearly erroneous standard in reviewing the court's background findings of fact.").

[45] *See Matanuska Elec. Ass'n, Inc. v. Rewire the Bd.,* 36 P.3d 685, 700-01 (Alaska 2001) (noting that use of clearly erroneous standard of review for factual findings in contempt proceedings "is consistent with the deferential review used by courts in other jurisdictions").

[46] 798 P.2d at 1274-78.

[47] 919 P.2d at 1340-42.

need occasionally to deviate from existing precedent.[48] We stated that we "will overrule a prior decision only when 'clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.'"[49] A prior ruling may be "originally erroneous" if it proves to be "unworkable in practice."[50] Changed conditions exist where "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [or] facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application."[51] This law of the case doctrine[52] maintains that issues previously adjudicated can only be reconsidered where there exist "exceptional circumstances"[53] presenting a "clear error constituting a manifest

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[48] 852 P.2d 1173, 1175 (Alaska 1993) ("When a common law court is asked to overrule one of its prior decisions, the principle of stare decisis is implicated. . . . [S]tare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt those norms to society's changing demands.").

[49] *Id.* at 1176 (quoting *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986)).

[50] *Pratt & Whitney Canada*, 852 P.2d at 1176.

[51] *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992)).

[52] *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 763 (Alaska 1977) ("The doctrine of the law of the case prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case. Even issues not explicitly discussed in the first appellate opinion, but directly involved with or 'necessarily inhering' in the decision will be considered the law of the case. This doctrine is akin to the doctrine of res judicata, in that it requires that a final judgment be rendered with respect to the issues at hand.") (citations omitted).

[53] *Patrick v. Sedwick*, 413 P.2d 169, 173-74 (Alaska 1966).

injustice."[54] Once a case has been heard,[55] there are strong policy reasons for refusing to rehear it.[56]

The State accuses the class of rearguing the same case they brought in 1996, particularly with regard to the class's interpretation of *Oregon Waste Systems, Inc. v. Department of Environmental Quality,* which the United States Supreme Court decided in 1994.[57] The State dismisses the only two post-*Carlson II* cases cited by the class– *Fulton Corp. v. Faulkner*[58] and *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*[59]–as inapplicable to the present case. [60] The class counters that there is no final judgment necessary to invoke

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[54] *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim Sch. Dist.,* 778 P.2d 581, 583 (Alaska 1989).

[55] *U.S. v. Hatter,* 532 U.S. 557, 566 (2001) ("The law of the case doctrine presumes a hearing on the merits.").

[56] *See Pratt & Whitney Canada,* 852 P.2d at 1175 ("[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it.") (quoting *Planned Parenthood,* 505 U.S. at 854).

[57] 511 U.S. 93 (1994).

[58] 516 U.S. 325 (1996).

[59] 520 U.S. 564 (1997).

[60] The State further argues that if there were anything questionable about the constitutionality of the fee differentials, the United States Supreme Court could have taken the case on certiorari but refused to do so. 519 U.S. 1101 (1997). However, the United States Supreme Court can deny certiorari for a variety of reasons. Therefore, denial of certiorari should not be taken as a judgment on the merits of the case. *See Bridgers v. Texas,* 532 U.S. 1034 (2001). It is easily conceivable that the Court refused certiorari because *Carlson II* was partially remanded and the Court wanted to wait to see what the final resolution of that case would be.

the law of the case doctrine as delineated in *Wolff*.[61] The class further asserts that the law of the case doctrine is only a general principle and not an unyielding prohibition on revisiting prior decisions.[62] We agree with the State that our previous decisions on this issue preclude its reconsideration.[63]

The question before us is whether any legal precedent has arisen subsequent to *Carlson II* to indicate that that decision was somehow in error. A United States Supreme Court decision contradicting our holding in *Carlson II* would indicate a clear error and require us to revisit the issue of the constitutionality of the fee differentials. We interpret *Fulton* and *Camps Newfound* as clarifying the Supreme Court's position in *Oregon Waste Systems;* these two cases do not, however, alter the law in a way that would cause us to rethink our decision in *Carlson II.* We therefore do not believe that such a contradiction exists, nor do we find any other reason to revisit our holding in *Carlson II.*

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[61] The class asserts that the law of the case doctrine is meant primarily as a restraint on trial courts. While this may be one of the functions, it is certainly not the exclusive purpose of the doctrine.

[62] *See Smith v. Cleary,* 24 P.3d 1245, 1248 (Alaska 2001) ("The doctrine of the law of the case is a matter of judicial policy and describes 'the practice of courts generally to refuse to reopen what has been decided,' but does not limit their power to do so.") (quoting *West v. Buchanan,* 981 P.2d 1065, 1067 (Alaska 1999)) (citations omitted).

[63] *See Smith,* 24 P.3d at 1248 ("[T]he policy against reconsidering issues adjudicated in a prior appeal or issues 'directly involved with or necessarily inhering' in a prior decision applies only if there has been 'a final judgment . . . with respect to the issues at hand.'") (citations omitted); *Brandon v. State,* 839 P.2d 400, 403-04 (Alaska App. 1992) ("The doctrine of the law of the case prohibits the reconsideration of issues that this court has adjudicated in a previous appeal in the same case.").

### 1. *Fulton Corp. v. Faulkner* [64]

*Fulton Corp. v. Faulkner* addressed an intangibles tax by the state of North Carolina on corporate stock. The tax was assessed on the fair market value of corporate stock owned by North Carolina residents.[65] However, residents were allowed to take a tax deduction equal to the percentage of the corporation's income that was subject to tax in North Carolina.[66] This resulted in an inverse relationship between the tax that North Carolina residents were required to pay and the extent to which the company did its business in North Carolina, such that, for example, if the company did all of its business within the state, a resident owning its stock would not be required to pay any intangibles tax on that stock.[67] The Court rejected this tax as a violation of the Commerce Clause.[68] The Court explicitly recognized the applicability of the dormant Commerce Clause to the case,[69] but further acknowledged that a tax that facially discriminates against interstate commerce may be constitutional if the effect on interstate commerce is incidental[70] or if the tax is

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[64] 516 U.S. 325 (1996).

[65] *Id.* at 327.

[66] *Id.* at 328.

[67] *Id.*

[68] *Id.* at 346.

[69] *Id.* at 330 ("In its negative aspect, the Commerce Clause prohibits economic protectionism–that is, regulatory measures designed to benefit in-state economic interests by burdening out- of-state competitors.") (internal quotations omitted).

[70] *Id.* at 331 ("In evaluating state regulatory measures under the dormant Commerce Clause, we have held that the first step .. . is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.")

designed to make those engaged in interstate commerce bear the same economic burden as those engaged in intrastate commerce.[71] The Court then outlined a three-part test for determining if a compensatory tax was constitutional: (1) the State must identify the intrastate tax burden being compensated; (2) the tax must be shown to approximate but not exceed the burden on intrastate commerce; and (3) the events which are being taxed must be shown to be substantially equivalent between interstate and intrastate commerce.[72]

Although *Fulton* will be relevant in our analysis of what expenses can be included in the "fisheries budget," it has no bearing on the basic allowability of fee differentials for

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(quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (internal quotations and citation omitted)).

[71] *Fulton*, 516 U.S. at 331 ("[A] facially discriminatory tax may still survive Commerce Clause scrutiny if it is a truly compensatory tax designed simply to make interstate commerce bear a burden already borne by intrastate commerce.") (internal quotations and citation omitted).

[72] *Id.* at 333. The Court, however, found that none of these conditions was satisfied by North Carolina's intangibles tax. *Id.* at 333-44. North Carolina attempted to argue that the intangibles tax "compensates for the burden of the general corporate income tax paid by corporations doing business in North Carolina." *Id.* at 334. North Carolina further argued that one of the services supported through a general corporate income tax "is the maintenance of a capital market for corporations wishing to sell stock to North Carolina residents." *Id.* at 335. The Court found this argument to be "unconvincing." *Id.* Drawing on *Oregon Waste Systems*, the Court found the use of a tax on interstate commerce to compensate for general revenues to be an "expansive loophole." *Id.* (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 105 n.8 (1994)). The Court proceeded to reject the specific application of the intangibles tax because of doubts that North Carolina used the tax proceeds to maintain an intrastate capital market, and the state's failure to detail the proportion of the corporate income tax used to support the capital market, as well as a lack of equivalence between out-of-state corporations and resident shareholders. *Fulton*, 516 U.S. at 336-40.

nonresidents because commercial fishing licenses are not objects of interstate commerce. We held in *Carlson II* that "[u]nlike the fee differentials in *Oregon Waste Systems* and *Chemical Waste*,[73] the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits."[74] Consequently, we held that the negative or dormant Commerce Clause did not apply to the present case, but rather that the fee differentials were properly analyzed under the Privileges and Immunities Clause.[75] Nothing in *Fulton* causes us to abandon this position. The tax in *Fulton* was tied directly to whether the corporation in question engaged in interstate or intrastate commerce.[76] It was therefore clearly "predicated upon the movement of articles of commerce across state lines."[77] No similar situation exists here, with the fee differential for nonresident commercial fishers relating not to commerce but

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[73] *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992).

[74] 919 P.2d at 1340.

[75] *Id.* at 1340-41. The Privileges and Immunities Clause does allow for nonresidents to be taxed on their business enterprises within a state. *See Shaffer v. Carter*, 252 U.S. 37, 52-53 (1920) ("That a state, consistently with the federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state.").

[76] *Fulton*, 516 U.S. at 327-28.

[77] *Carlson II*, 919 P.2d at 1340.

rather to the opportunity to utilize Alaska's natural resources. Consequently, *Fulton* does not provide a reason to revisit an issue decided in *Carlson II*.[78]

### 2. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*[79]

In *Camps Newfound,* the United States Supreme Court struck down a local Maine property tax exemption for a charitable camp that primarily served state residents.[80] A Maine town had attempted to argue that the business of the camp did not involve articles of commerce because the services of the camp were "delivered and 'consumed' entirely within Maine."[81] The Court noted that "[t]he attendance of these campers necessarily generates the transportation of persons across state

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[78] Even if we were to reach this issue, the fee differential would fall under the exception listed in *Fulton* whereby states can impose a facially discriminatory tax as long as it "make[s] interstate commerce bear a burden already borne by intrastate commerce." 516 U.S. at 331. We reached this conclusion in *Carlson I,* where we stated that "the state may equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference." 798 P.2d at 1278. We affirmed this decision in *Carlson II.* 919 P.2d at 1341-42. Furthermore, the fee differential satisfies the three-part test laid out in *Fulton:* (1) the fee differential is compensating for a clearly defined intrastate burden; (2) the fee differential is limited such that it does not exceed the burden borne by state residents; and (3) the event being taxed, namely the license to use state fisheries, is the same for residents and nonresidents. *See Fulton,* 516 U.S. at 333, *Carlson II,* 919 P.2d at 1342-44. Therefore, even if the fee differential were held to bear on interstate commerce, it would fall under one of the exceptions to the negative Commerce Clause.

[79] 520 U.S. 564 (1997).

[80] *Id.* at 568-95.

[81] *Id.* at 572.

lines that has long been recognized as a form of 'commerce.'"[82] We find there to be no direct analogy between the campers in *Camps Newfound* and the movement of commercial fishers into Alaska. The Court in *Camps Newfound* drew a comparison of the summer camps to hotels.[83] This comparison indicates a sufficient distinction from commercial fishing licenses and permits to allay concerns about the constitutionality of the fee differential.

The Court in *Camps Newfound* further compared the summer camps to a natural resource.[84] The Court pointed out that there is a long history of allowing residents and nonresidents alike equal access to natural resources in a state.[85] Quoting from *New England Power Co. v. New Hampshire,*[86] a case in which the Court struck down a New Hampshire law attempting to place restrictions on a public utility's sales of hydroelectric energy generated in the state to out-of-state consumers, the Court stated that "[w]e have 'consistently . . . held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.'"[87] The Court considered the two situations analogous because in both cases "the burden fell on out-of-state

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[82] *Id.* at 573.

[83] *Id.* at 573.

[84] *Id.* at 576-77; *see also Hughes v. Oklahoma,* 441 U.S. 322, 337-38 (1979) (striking down as violation of Commerce Clause Oklahoma law that placed no limits on number of minnows that could be caught and used within state but prohibited transportation of minnows out of state for sale because regulation of natural resources does not allow state to circumvent Commerce Clause).

[85] *Camps Newfound,* 520 U.S. at 576.

[86] 455 U.S. 331, 338 (1982).

[87] *Camps Newfound,* 520 U.S. at 576.

access both to a natural resource, and to related services provided by state residents."[88] The Court explained that "[b]y encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent."[89]

The law in the present case, however, does not hinder or deny access to Alaska's natural resources, which in this case are the fisheries. Rather, the law merely allows the State to recoup from nonresidents the amount spent on maintaining the natural resource of the fisheries that it would be able to recover from nonresidents were they instead residents of Alaska. Nonresidents are being provided with equal access to the resource on the condition that they make a contribution to the maintenance of the resource equal to that made by state residents.[90] The situation in the present

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[88] *Id.* at 577.

[89] *Id.* at 578.

[90] *Oregon Waste Systems v. Department of Environmental Quality* specifically distinguishes the situation in that case, where a higher fee was charged for the disposal of out-of-state waste than for in-state waste even though the cost of disposal of waste was the same no matter where the waste was generated, from a situation such as the present one where, absent a higher nonresident fee, the use of the fisheries and the cost of maintaining them imposes a higher cost on residents than on nonresidents. 511 U.S. 93, 101 (1994). Because the present case is properly analyzed as a Privileges and Immunities case, the primary concern is "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell,* 334 U.S. 385, 395 (1948). While nonresidents cannot be disadvantaged by their movement across state lines, there is nothing requiring that they benefit by such movement either. Nonresidents can therefore be required to compensate the state for the state resources they use. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 281 (1977) ("[T]he Court consistently has indicated that 'interstate commerce may be made to pay its way,' and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology."). The holding in

case can therefore be distinguished from that in *Camps Newfound.* Thus, there is no reason to revisit our decision in *Carlson II.*

### B. The Formula for Calculating the Allowable Fee Differential for Nonresident Commercial Fishing Fees

In *Carlson II,* we held the per capita formula advanced by the class to be, in comparison to the pro rata formula proposed by the State, "the correct method for calculating the contribution made by residents."[91] The formula calculates the per capita resident contribution to the cost of fisheries management, regardless of whether this person is a fisher, as follows: (Fisheries Budget/Alaska Population) X (percentage of State Budget from oil revenues/1.0).[92] The figure determined by this formula for any given year is then compared to the actual fee differential charged. If the fee differential paid by the nonresident commercial fishers, i.e., the nonresident fee minus the resident fee for the same access, exceeds the resident contribution as calculated by the formula, then "the State will have failed to demonstrate that the means employed by its statute have a substantial enough relationship to the legitimate interest of the statute to survive Privileges and Immunities Clause review."[93]

It should be noted that the formula advanced by the class and adopted in *Carlson II* is not the only conceivable means for calculating an allowable fee differential for nonresidents. The United States Supreme Court requires only a "reasonable relation

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*Carlson II* accomplishes this by limiting the fee differential to the per capita resident contribution. *Carlson II,* 919 P.2d at 1343.

[91] 919 P.2d at 1342.

[92] *Id.* at 1343.

[93] *Id.* at 1344.

between the higher fees and the higher cost."[94] In *Carlson II*, we found the per capita formula advanced by the class to be an acceptable method for calculating the resident contribution to fisheries management and hence the allowable nonresident fee differential.[95] We continue to uphold the applicability of this formula.

We should clarify, however, that a refund will only be necessary if the difference between the actual fees charged to

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[94] *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). It is worth noting in passing that a multitude of other states allow nonresident commercial fishers to be charged higher fees than resident commercial fishers without any apparent reliance upon a formula to calculate the allowable fee differential. Delaware charges $150 for a resident commercial food fishing license and $1,500 for a comparable nonresident license. Del. Code Ann. tit. 7, § 914 (2001). Florida requires residents to pay $50 for a saltwater products license for an individual and $100 for a boat. Nonresidents are required to pay twice these amounts. Fla. Stat. 370.06(2) (a) (West 2001). Georgia charges $12 for a resident commercial fishing or crabbing license and $118 for a nonresident fishing or crabbing license. Ga. Code § 27-2-23 (2001). Maine establishes a fee of $89 for a commercial fishing license for a resident operator and all crewmembers and $334 for a commercial fishing license for a nonresident operator and all crewmembers. Me. Rev. Stat. Ann. tit. 12, § 6501 (West 2001). Michigan charges nonresidents five times the amount charged a resident for the same license. Mich. Comp. Laws Ann. § 324.47330 (West 2001). For commercial eel fishing licenses New Jersey charges nonresidents the greater of the New Jersey fee or the amount that the nonresident would pay in their state of residence. N.J. Stat. Ann. § 23:3-72 (West 2001). In Oregon, a resident commercial fishing license costs $50 and a nonresident commercial fishing license costs $100. Or. Rev. Stat. § 508.285(d), (e) (2001). South Carolina charges nonresidents five times the amount it charges residents for a variety of commercial equipment licenses. S.C. Code Ann. § 50-5-325 (Law Co-op 2001). Texas charges nonresidents $100 for a general commercial fisherman's license as compared to $15 for residents and $125 as compared to $65 for a commercial finfish fisherman's license. Tex. Parks and Wild. Code Ann. § 47.002-03 (Vernon 2001).

[95] 919 P.2d at 1342-43.

resident and nonresident commercial fishers is substantially in excess of the allowable fee differential indicated by the formula, such that the actual fees do not bear a reasonable relationship to costs not otherwise paid by nonresidents.[96] We leave to the superior court on remand to determine whether proportionality exists in any particular instance and whether a refund is due. These determinations are subject to review using an abuse of discretion standard.[97]

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[96] *See Lunding v. New York Tax Appeals Tribunal,* 522 U.S. 287, 297 (1998) ("[A]s a practical matter, the Privileges and Immunities Clause affords no assurance of precise equality in taxation between residents and nonresidents of a particular State. Some differences may be inherent in any taxing scheme, given that, '[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute,' and that '[a]bsolute equality is impracticable in taxation.' Because state legislatures must draw some distinctions in light of 'local needs,' they have considerable discretion in formulating tax policy. Thus, 'where the question is whether a state taxing law contravenes rights secured by [the federal Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.'" (citations omitted)); *Maxwell v. Bugbee,* 250 U.S. 525, 543 (1919) ("[I]nequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."); *see also Shaffer v. Carter,* 252 U.S. 37, 55 (1920) ("[W]here the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."); *Travelers' Ins. Co. v. Connecticut,* 185 U.S. 364, 371 (1902) ( "It is enough that the state has secured a reasonably[ ] fair distribution of burdens, and that no intentional discrimination has been made against nonresidents.").

[97] *See Breck v. Moore,* 910 P.2d 599, 606 (Alaska 1996) ("This court reviews an award of damages for an abuse of discretion and independently reviews the law applied by the trial court.").

### 1. *Components of the fisheries budget*

The findings of fact and conclusions of law by the superior court describe the fisheries budget as being comprised of the State's "direct operating expenditures" and the State's "indirect operating expenditures." The State in its pre-trial brief contended that the fisheries budget consists of six components: "(1) direct operating expenditures; (2) indirect operating expenditures; (3) general government expenditures; (4) capital costs; (5) hatchery loan fund subsidy; and (6) foregone revenues from fishery resources." Judge Michalski only accepted the first two of these items.

The concept of a fisheries budget goes well beyond what any particular agency requests from the State. It is necessary, then, to determine what the State spends from its general funds on its commercial fisheries. The record must support the belief that a rational relationship exists between the fee differential and the average cost of fisheries management to the resident.[98]

In determining the fisheries budget, Judge Michalski found that the figures the State provided for direct operating expenditures were justifiable and should be included in the final calculations. This figure totaled $126,099,100 for fiscal year 1996. Judge Michalski also held that indirect operating expenditures could be included in the fisheries budget as "based upon the federal formula for identifying indirect operating expenses[.]" The class does not challenge these indirect costs, which totaled $1,189,900

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[98] *See Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993) ("[T]he record does not disclose that the Commonwealth of Virginia has shown that it created any credible method of allocating costs as between residents and nonresidents which places the burden equally or approximately equally upon residents and nonresidents.").

in fiscal year 1996.[99] Judge Michalski rejected the State's proposed inclusion of general government expenditures, capital costs, the hatchery loan fund, and forgone revenue from fisheries resources in the fisheries budget. The State challenges each of these exclusions.

The class challenged the list of fisheries expenditures provided by the State for direct operating expenditures as overly broad. The State sought to include in direct operating expenditures all those expenditures which go directly to support the commercial fishing industry as a whole. The *Carlson* cases hold that nonresidents can be made to pay for their share of the costs of fisheries management.[100] There is no precedent for determining if direct costs, indirect costs, general government expenditures, capital costs, the hatchery loan fund, and forgone revenue from fisheries resources in the fisheries budget are properly to be included in the expenses for fisheries management. Because this issue turns upon the legality of including different types of expenses in the budget for fisheries management, we decide the issue as a question of law.[101] Once the parameters of these budget components are established, the issue of calculating the exact amount of each component is a question of fact which is reviewed for clear error.

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[99] The class at trial did raise some objections to the way in which the State calculated indirect expenditures, mostly having to do with a blurring of the line between direct and indirect expenditures. On its cross-appeal, the class seems satisfied with the stipulated indirect expenditures in the findings of fact. However, if the amount of direct fisheries expenditures is adjusted, the indirect expenditures will have to be adjusted accordingly.

[100] *Carlson I,* 798 P.2d at 1278; *Carlson II,* 919 P.2d at 1342-43.

[101] *See Moody v. Delta Western, Inc.,* 38 P.3d 1139, 1140 (Alaska 2002) (holding that in question of law that is coming to court as case of first impression, de novo standard of review is applied).

**a. Judge Michalski was not clearly erroneous in adopting the State's budget figures for direct and indirect costs.**

Judge Michalski held that both direct and indirect operating expenditures should be included in the fisheries budget. We agree with this conclusion. In *Carlson I,* we stated that the State may "equalize the economic burden of fisheries management" by recovering from nonresidents the forgone revenues that residents pay for this expense.[102] The direct operating expenditures of fisheries management are implicitly included in this holding. The indirect operating expenditures are also contemplated by this holding because without the direct operating expenditures the indirect operating expenditures would not have been generated.[103]

The class does not challenge the general validity of either direct or indirect operating expenditures. Rather, it challenges the State's methodology for determining these figures by arguing that some of the amounts claimed by the State as direct operating expenses are not in fact directly associated with the costs of fisheries management.[104] However, following arguments by the

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[102] *Carlson I,* 798 P.2d at 1278.

[103] *See State v. Northwestern Constr., Inc.,* 741 P.2d 235, 240 (Alaska 1987) (allowing inclusion of overhead costs in breach of contract suit against state).

[104] As the class notes, the State in *Carlson I* identified four sources as the "aggregate cost of fisheries management"–the annual operating budget of the Commercial Fisheries Entry Commission, 40.6% of the annual operating budget of the Department of Public Safety, the annual operating budget of the Division of Commercial Fisheries of the Department of Fish and Game, and the annual operating budget of the Fisheries Rehabilitation Enhancement and Development Division of the Department of Fish and Game. 798 P.2d at 1272. In *Carlson II,* the State similarly provided a chart in defense of its proposed pro rata formula listing "Expenditures By Four Agencies For Commercial Fishery Management." 919 P.2d at 1346. This

parties on the appropriateness of the inclusion of different sub-components within the direct operating expenditures, Judge Michalski found that "the State's methodologies for valuing [direct and indirect operating expenditures] are appropriate." The class presents no persuasive argument on cross-appeal that this determination by the superior court is clearly erroneous. Judge Michalski agreed with the testimony by the State's expert witness that the disputed costs were directly related to the costs of fisheries management.[105] The testimony was sufficient to show that Judge Michalski was not clearly erroneous in his findings. Therefore, we affirm the findings of the superior court with regard to the methodology for determining direct and indirect operating expenditures and the corresponding calculations.

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chart goes from 1982 to 1989 and ranges from $29.0 million to $34.8 million; the amount in 1989 was $29.9 million. *Id.* The State presently seeks to include in the direct operating costs expenses beyond those limited to the four agencies it previously advanced. However, in the previous iterations of this case, the State did not have the benefit of knowing the formula by which the allowable fee differential is to be calculated. Therefore, the State was justified in offering a different definition of the fisheries budget than the one under which it previously operated since this earlier definition had effectively been rendered moot. Judge Michalski was consequently not in error to hear arguments on this matter.

[105] For example, the second largest single expense for the direct operating costs is that of the "shared fish taxes." The class argues that these funds should not be counted as revenues because they are provided to local municipalities to defray fisheries-related impacts. The State responds that the revenue from the taxes goes to the general fund and is only then appropriated to municipalities. Judge Michalski did not rule explicitly on this issue. We hold that there is no difference between the shared fish taxes and other components of the fisheries budget. Judge Michalski accepted in whole the State's determination of the direct operating expenditures, which included the shared fish taxes. While testimony was offered that the taxes are essentially just a bookkeeping maneuver, it was not clearly erroneous for Judge Michalski to find them otherwise.

### b. General governmental expenditures cannot be included in the fisheries budget.

The State argues that it should be able to include "general governmental expenditures," such as "corrections, health care, and education," in determining the fisheries budget because if these services were not provided "the commercial fishing industry would either be inefficient or could not exist." The State further argues that these figures are tied to population and economic growth in the sense that an increase in commercial fishing leads to an increase in population, which results in a corresponding growth in state expenditures on basic services.[106]

*Toomer v. Witsell,* a United States Supreme Court case on which the prior *Carlson* decisions rely, stated hypothetically that a fee differential allowing the State to recover conservation expenditures from taxes which only residents pay would be permissible.[107] *Carlson I* and *Carlson II* discussed allowing a fee differential to "equalize the economic burden of fisheries management."[108] Neither conservation expenditures nor fisheries management is as expansive as the general governmental expenditures that the State contends should be included in the fisheries budget. Judge Michalski noted that "the laws that relate to a particular case or the laws of the state are not necessarily the same as the economic laws and the rules that apply to things." While in economic terms the State may bear much of the cost of government generated by the fishing industry, this does not

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[106] The State and the class disagree as to the admissibility of expert testimony on the issue of the inclusion or exclusion of general governmental expenditures in the total fisheries expenditures; this, however, is a question of law and thus does not turn on expert testimony. We therefore need not address their dispute.

[107] 334 U.S. 385, 399 (1948).

[108] *Carlson I,* 798 P.2d at 1278; *see also Carlson II,* 919 P.2d at 1342.

translate into a legal justification for including these costs in the fisheries expenditures.

There is clear precedent against including the general costs of government in any fee differential for nonresidents as part of a compensatory tax scheme. Citing *Oregon Waste Systems, Fulton* noted "the danger of treating general revenue measures as relevant intrastate burdens for purposes of the compensatory tax doctrine."[109] And *Camps Newfound* described *Chemical Waste* as holding that "special fees assessed on nonresidents directly by the State when they attempt to use local services impose an impermissible burden on interstate commerce."[110] The Supreme Court, rejecting the State's claim that its surcharge on out-of-state garbage was compensatory in nature, stated in *Oregon Waste Systems* that permitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation "would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds." We decline respondents' invitation to open such an expansive loophole in our carefully confined compensatory tax jurisprudence."[111]

Nonresident commercial fishers may be expected to reimburse the State for a share of the costs of fisheries management. But to include general governmental costs in the manner in which the

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[109] *Fulton Corp. v. Faulkner,* 516 U.S. 325, 335 (1996).

[110] *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 520 U.S. 564, 578 (1997) (citing *Chemical Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 342 (1992)).

[111] *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 105 n.8 (quoting *Gov't Suppliers Consolidating Servs., Inc. v. Bayh,* 975 F.2d 1267, 1284 (7th Cir. 1992)).

State suggests would expand the scope of the fisheries budget beyond the bounds of constitutionality.

**c. Capital costs directly supporting the commercial fishing industry can be included in the fisheries budget.**

The State claims that both those capital expenditures that directly support the commercial fishing industry and general capital expenditures driven by population growth should be included in the fisheries budget. Judge Michalski rejected the inclusion of all capital costs in the fisheries budget, and the State has appealed.

The general capital expenditures are rejected for the reasons given in the previous section. As for the capital expenditures directly related to the commercial fishing industry, such as for boat harbors and salmon hatcheries, those costs should be included in the fisheries budget to the extent that they are not already included in the direct operating expenditures. These direct capital expenditures are a clearly identifiable result of the costs of fisheries management and as such justify the contribution of nonresidents to their payment thereof. Because the superior court rejected outright the inclusion of all capital costs, no differentiation was made between general capital costs and those directly supporting the commercial fishing industry. Such a determination will be necessary upon remand. If these costs are already included in the direct operating expenditures, the State will not be allowed to count them twice.

**d. The hatchery loan fund subsidy should be included in the fisheries expenditures.**

The State operates a revolving loan fund to support investments in developing and operating fish hatcheries and other fish enhancement projects. The legislature created the Fishing Enhancement Revolving Loan Fund in 1977 to provide loans with

favorable interest rates and repayment terms to private fishing corporations. By subtracting the present value of the future loan returns from the amount presently loaned, the State's expert was able to calculate what he considered a subsidy for the hatchery loan fund. However, testimony also was given that the funds collected in loan repayments do not go into the general fund but rather are used for new loans. Judge Michalski held that the supposed deficit incurred by the hatcheries loan fund was not a budgetary item "within the meaning of *Carlson II*" and thus could not be included in the fisheries expenditures for the purpose of determining nonresident contributions.

The State contends that the loan subsidy represents forgone revenues that the State could otherwise spend at present value. We agree. The hatcheries loan fund certainly benefits the commercial fishing industry. As such, it can be included in the costs of maintaining commercial fisheries. The State's expert at trial calculated the cost to the State attributed to the hatcheries loan fund to be approximately $2.3 million for 1996. Because there appears to be some confusion as to whether the State is presently transferring any funds to the hatcheries loan fund and because the superior court did not make a ruling on what this amount would be, we remand on this issue for a determination of the yearly amount expended by the State to support this program. As with the capital costs, the expenditure for the hatcheries loan fund must not already have been included in the direct operating expenditures.

**e. Forgone revenues from commercial fishery resources cannot be included in the fisheries expenditures.**

The State argues that because Alaska has the authority to manage its fish resources and could manage them in a way that is more profitable than the current method of fish management, it incurs an opportunity cost that should be included in the fisheries

expenditures. The State cites a District of Columbia Circuit case in which the court remanded for consideration of whether a city could include "the value [the City] could have obtained in the best alternative use" in its calculation of the fair market value of the airfield land for the purpose of calculating user airplane landing fees.[112] That same court also held that opportunity costs can be used in setting utility rates.[113] Both of these property or energy rate value assessments, however, are fundamentally different from the State making a policy decision to allocate and utilize its resources in a particular way. The State has consciously chosen the manner in which it manages its fish, and has therefore decided to forgo any revenues that could be obtained from alternate forms of management. The State cannot recoup from nonresidents the possible revenue it forgoes in making policy decisions regarding its fisheries management. We therefore affirm the holding of Judge Michalski to exclude forgone revenues from the cost of commercial fisheries management.

### 2. *What can be included in oil revenues?*

The class argues that the trial court erred by including interest income deposited into state savings accounts as a part of oil revenues. The class contends that because nonresidents do not benefit from deposits into the permanent fund and the constitutional budget reserve, those amounts should not be included in the calculation of oil revenues. However, because the class proposes including deposits into the permanent fund and the constitutional budget reserve in the figure for the total state budget, by which the oil revenues would be divided, its recommended calculation of the percentage of the state budget derived from oil revenues is clearly unworkable. One cannot

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[112] *City of Los Angeles Dep't of Airports v. United States Dep't of Transp.*, 103 F.3d 1027, 1034 (D.C. Cir. 1997).

[113] *See Pa. Elec. Co. v. F.E.R.C.*, 11 F.3d 207, 209-10 (D.C. Cir. 1993).

exclude deposits into state savings accounts from the numerator of the formula determining the percentage of the state budget that is derived from oil revenues but include such deposits in the denominator, as this would inappropriately and dramatically reduce the percentage of the state budget derived from oil revenues.[114] Apples must be divided by apples, not oranges.

The class alternately proposes that investment earnings be removed from both the oil revenues and the total state budget expenditures by which the oil revenues are divided to determine the percentage of the budget funded by oil revenues. The class supports its position by noting that we have previously relied upon budget figures that included a variety of petroleum taxes, royalties, and rents, but not any interest income, in determining petroleum-related income.[115] Furthermore, the State, in its bi-yearly REVENUE SOURCE BOOK, uses this methodology in determining the percentage of unrestricted petroleum revenue as compared to unrestricted general funds.[116]

The State counters by arguing that because the source of the funds that generates the interest income is ultimately petroleum-derived, it should be included in the oil revenues component. It should not matter, the State contends, how these funds are spent, only how they are derived, even if the expenditure of the funds is of no benefit to nonresidents. The State proceeds to demonstrate how the 74% figure was calculated by including the petroleum-derived revenues deposited in state savings accounts in both the

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[114] The class approach yields a figure of 29.7%, far less than the 74% adopted by Judge Michalski.

[115] *Trustees for Alaska v. State, Dep't of Natural Res.*, 795 P.2d 805, 810 (Alaska 1990).

[116] This calculation yields the 86% figure previously relied upon by this court in *Trustees for Alaska*. 795 P.2d at 810.

numerator and denominator of the percentage of the state budget derived from oil revenues.

Judge Michalski accepted the State's methodology for calculating the percentage of the state budget derived from oil revenues, resulting in a figure of 74%. This calculation includes the interest income and permanent fund expenditures in both the numerator and the denominator. As with the basic formula for maximum allowable fee differential, there is no single correct method by which to calculate the percentage of the state budget derived from oil revenues. The key inquiry is that the methodology adopted bear a reasonable relationship to the figure to be calculated. The decision of the superior court to adopt the State's method of calculation is therefore reviewed for an abuse of discretion.[117] Because the State's methodology provides a reasonable means for calculating the percentage of the state budget derived from oil revenues, we find there to be no abuse of discretion and accordingly affirm the superior court.

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[117] *See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1370 (9th Cir. 1986) ("The choice of methodology is a highly technical question which falls within the unique expertise of the Council. Unless an abuse of discretion is demonstrated, this court will not substitute its judgment on particular testing methodology."); *United States Steel Group-A Unit of USX Corp. v. United States*, 873 F. Supp. 673, 700 (Ct. Int'l Trade 1994) (holding that choice of methodology by trade commission was subject to review by abuse of discretion standard); *see also Dansereau v. Ulmer*, 955 P.2d 916, 919 (Alaska 1998) (holding that superior court did not abuse its discretion in adopting particular methodology to calculate number of hours litigants' attorneys worked for purpose of determining award of attorney's fees); *Gallant v. Gallant*, 882 P.2d 1252, 1257 (Alaska 1994) (reviewing for abuse of discretion allocation of child support in novel case involving nonparental custody).

### C. The State Has Previously Conceded that the Class Met the Protest Requirement.

The class filed suit on June 22, 1984, questioning the "legality of the State of Alaska's discriminatory fees for nonresident commercial fishing permits and licenses." The class on behalf of which the suit was filed was defined as "all persons who participated in one or more Alaska commercial fisheries at any time who paid nonresident assessments to [the] State for commercial or gear licenses or permits." On December 10, 1984, the State entered its nonopposition to certification of the case as a class action, though it did reserve the right to request that the class be divided into subclasses. On December 13, 1984, Superior Court Judge Milton M. Souter entered an order certifying the class. A later motion to decertify the class was denied by Judge Michalski on July 17, 1998. Judge Michalski held that the elements of numerosity, commonality, typicality, and adequacy of representation existed to justify continued certification of the class.

Alaska Statute 43.10.210(a) requires that in order for a refund to be given on an illegal tax, the tax must have been paid under protest. We held in *Carlson I* that a license was a tax within the meaning of the refund statute and that therefore the protest requirement applied to the class.[118] In *Principal Mutual Life Insurance Co. v. State, Division of Insurance,* we held that "[t]he protest requirement called for by AS 43.15.010(a)[119] serves . . . as proof that the payment of the tax in question was involuntarily made and it provides notice to the taxing authority that the tax is claimed to be illegal as well as the basis of the

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[118] 798 P.2d at 1280.

[119] The statute has subsequently been renumbered as AS 43.10.210(a).

taxpayer's assertion."[120] A requirement of protest provides the state with notice of more than mere opposition to the tax–it provides the state with notice that it may soon be facing a lawsuit to recover the allegedly illegal amount. Once on notice, the state can budget accordingly to prepare for the possibility of losing at trial and being forced to refund the disputed amount.[121]

Judge Michalski held that the purpose of the notice requirement was met by the certification of the class action suit. The certification of a lawsuit over allegedly illegal taxes puts the state on notice that the taxes are being protested and that future tax recovery may be subject to being refunded. The State, however, argues that notice of named plaintiffs does not translate into notice of the entire class of plaintiffs and that at the very least the class should not be entitled to retrospective relief.[122] Judge Michalski held that the expansive definition of the class as containing all fee-paying commercial fishers gave the state sufficient notice of the potential scope of the recovery. Judge Michalski further held that the certification of a class action suit obviated the need for individual protest by each class member,

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[120] 780 P.2d 1023, 1030 (Alaska 1989).

[121] *Id.* at 1030-31 ("The burden of requiring a taxpayer to file a protest at the time of payment of the tax is at most minimal. On the other hand the requirement of a protest serves the important function of providing state government with notice of the claimed tax illegality, the grounds advanced in support of the claimed illegality, and affords the state the opportunity to fashion budget appropriations, or expenditures, taking into account the magnitude of the claimed tax illegality. We think these are significant considerations which warrant the retention of the requirement of a protest.").

[122] The State asserts that an early superior court argument created an estoppel argument against retroactive fees. The protest issue of this superior court opinion, however, was remanded for further inquiry in *Carlson I,* albeit without specifically addressing the estoppel argument alluded to by the superior court. 798 P.2d at 1280.

reasoning that "[r]equiring individual protest for each class member would do nothing to further inform the state. Instead, it would be merely an exercise in formality and technicality."

The State has long since conceded that, as to fees paid after June 22, 1984, the protest requirement was met by the filing of the class action suit and that sufficient notice had been given "for purposes of AS 43.10.210(a)." In its reply brief in the superior court, dated September 2, 1992, the State asserted:

> Plaintiffs are wrong when they assert that the State has conceded the right to a refund of any unconstitutional fees paid after the date plaintiffs filed their lawsuit. While this point is irrelevant to the issue immediately before the court, the State concedes only that the lawsuit serves as an adequate notice of protest for purposes of AS 43.10.210(a). In other words, all fees paid after June 22, 1984, by nonresident commercial fishers who ultimately elect to join the class, in excess of fees paid by similarly situated resident commercial fishers, are deemed to have been paid under protest. The protest requirement of AS 43.10.210(a), however, is merely one precondition to the "[r]ecovery of overpayments and protested payments." [citing an earlier memorandum] The State does not concede that plaintiffs have satisfied any other procedural or substantive requirements that may apply.[123]

This admission that the protest requirement had been met is consistent with the State's earlier admissions that it was provided with sufficient notice. In an opposition to plaintiff's motion for a

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[123] This statement was given in a reply brief opposing waiver of the protest issue. The State made a similar statement on March 1, 1991 in a memorandum in support of a motion for summary judgment: "The state does not dispute here that the differential paid by nonresidents to engage in commercial fishing since the date that this class action was filed, June 22, 1984, have been paid under protest."

preliminary injunction, dated February 19, 1991, the State asserted that

> [w]ith regard to any nonresident differentials which have been received by the state since this class action was filed, the state views the lawsuit itself as a protest giving the state the contemplated notice. Thus, for any differentials received between now and the conclusion of this case, should any portion of those be determined to be invalid, plaintiffs can avail themselves of the statutory refund remedy identified by the supreme court to obtain damages.

The State presently contends that prior to Judge Michalski's ruling in 1998 it had no reason to believe that it would be required to pay a refund and thus should not be required to pay a refund retrospectively all the way back to 1984. However, the purpose of the protest requirement, as stated above, is to give the state notice that it may eventually be required to pay a refund.[124] The fact that the litigation may take a long time to resolve and that the refund may thus grow increasingly large does not absolve the State of its eventual responsibility to pay. Thus, the only relevant question is whether the filing of a class action gives the State sufficient notice that every member of the class may be due a refund.[125] We agree with Judge Michalski that it does.

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[124] *See Principal Mutual Life Ins.*, 780 P.2d at 1030-31.

[125] The class argues that federal due process prevents the denial of retroactive tax recovery under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) ("To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.") (citations omitted). In *McKesson*, the United States Supreme Court ordered that a refund be given for an illegal tax even though Florida

The State cites *Era Aviation* in support of its claim that a separate protest must be attached to each separate complaint.[126] *Era Aviation* involved a suit by several air carriers to protest increased landing fees at rural airports.[127] After the original set of plaintiffs were granted summary judgment, a different set of air carriers tried to join the suit and recover fees retroactively.[128] We held that the second set of air carriers did not satisfy the necessary protest requirement at the time of the payment of the fees, even though they had stated their opposition to the landing fees on numerous occasions and even though the suit by the original set of air carriers put the state on notice that the fees might be illegal.[129] As the State is careful to point out, however, in *Era Aviation* we expressly declined to answer the question whether a class action suit would satisfy the protest

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claimed this would cause the state serious economic injury. 496 U.S. at 51 n.35 ("We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds."). The class errs, however, when it invokes *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) (holding that federal remedy for unlawful tax applies not only to case at issue but also to parties in all other open cases). In the present case, the class either exists as a whole or it does not exist at all for the purposes of the protest requirement. There are thus no other open cases to which a due process concern could apply.

[126] *Era Aviation, Inc. v. Campbell*, 915 P.2d 606, 609 (Alaska 1996) ("[U]nder common law as well as under statute, a protest at the time of payment is a prerequisite for an action to recover taxes.").

[127] *Id.* at 607. The original plaintiffs did not form a class.

[128] *Id.* at 607-08.

[129] *Id.* at 612.

requirement.[130] *Era Aviation* is thus not dispositive of the present situation.

In a further attempt to prove that the protest requirement would not be satisfied by a class action, the State cites a series of cases where class status has been denied for failure to satisfy the proper administrative procedures for protest.[131] These cases, however, are not applicable to the present case, where the class has already been certified. The present class satisfied the necessary procedural hurdles, and the State did not object to the certification of the class. Furthermore, the State, because it was the entity issuing the commercial fishing licenses and permits, had ample opportunity to keep records of those to whom these licenses and permits were being issued. It is therefore disingenuous for the State to claim that it was somehow caught unaware as to the ultimate size of the class or the potential recovery. For this reason, we affirm the holding of Judge Michalski that the protest and notice requirement was satisfied.

As to the date from which the fees can be measured, Judge Michalski selected December 13, 1984, which was the day the class was certified.[132] The class does not challenge the date of

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[130] *Id.* at 612-13 (noting that state's ability to determine accurately its potential liability for fee refunds "would be undermined if a single lawsuit (which was not even a class action) were deemed sufficient notice to make all payers under the regulation eligible for refunds").

[131] *Aronson v. City of Pittsburgh*, 98 Pa. Cmwlth. 1, 510 A.2d 871, 873 (1986); *Aronson v. Commonwealth*, 401 Mass. 244, 516 N.E.2d 137, 144 (1987).

[132] The class action suit was filed on June 22, 1984. In *Carlson II*, we held that "the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210." 919 P.2d at 1344. As noted above, the State several times also stated that the protest requirement was met as of June 22, 1984. These prior statements, however, do not require us to

certification as the date from which fees can be measured. We therefore affirm December 13, 1984 as the date from which fees can be measured.

### 1. *Named class members can sue for tax relief on behalf of unnamed class members.*

Even if a class action suit constitutes notice, there is a separate question as to whether the named class members can sue on behalf of the unnamed class members without the unnamed class members themselves protesting the increased nonresident fees. Judge Michalski held that the class was to be treated as a unified legal entity and that therefore absent and non-protesting (i.e., unnamed) class members could not be excluded from the recovery of excess fees. This is consistent with both *Carlson I* and *Carlson II,* both of which speak of the class as a whole and neither of which mentions the possibility that only the named class members will be able to receive a refund.[133]

The State asserts that named class members should not be allowed to sue for unnamed class members because there are too many variables that determine exactly what each nonresident commercial fisher is to recover. Because individual interests in recovery are so unique, the State argues, only the individual taxpayers should be allowed to sue for their own recovery. The State also cites two cases where class status was denied to a taxpayer attempting to sue on behalf of a similarly situated taxpayer who had not protested the tax.[134]

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reverse the decision of the superior court, which was not an abuse of discretion.

[133] *See Carlson I,* 798 P.2d at 1279-80; *Carlson II,* 919 P.2d at 1343-45.

[134] *Hooks v. Comptroller of Treasury,* 265 Md. 380, 289 A.2d 332, 333-34 (1972); *Edisto Fleets, Inc. v. S.C. Tax Comm'n,* 256 S.C. 350, 182 S.E.2d 713, 714 (1971).

These arguments would be appropriate in a motion to decertify the class, but the State lost on its bid to decertify the class and does not challenge that holding on appeal. Instead, the State attempts to circumvent the class certification issue by arguing that named class members cannot sue on behalf of unnamed class members. Yet, this is precisely the purpose of forming a class in the first place. Indeed, in *Nolan v. Sea Airmotive, Inc.*, we stated that one of the reasons for revising Alaska Civil Rule 23, the rule for establishing class actions, into its current form was "to end the 'perverse anomaly' by which there could 'be such a thing as a class action that did not run fully for or against the class.'"[135] Class action suits, in which the result for one becomes the result for many in the same legal predicament, are necessary to avoid a multiplicity of duplicative lawsuits.[136] Requiring that each nonresident commercial fisher file suit on his or her own behalf, which is what the State seems to be advocating, would produce exactly that result. Therefore, Judge Michalski's decision that named class members may sue on behalf of unnamed class members is affirmed.

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[135] 627 P.2d 1035, 1044 (Alaska 1981) (quoting Benjamin Kaplan, *"The Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure,"* 81 HARV. L. REV. 356, 386 (1967)). We therefore struck down a statutory requirement that an individual be named in a wage and hour suit in order for the statute of limitations to be tolled. 627 P.2d at 1046-47. The class correctly notes that AS 43.10.210 does not require prospective class members to opt into the class.

[136] *Nolan*, 627 P.2d at 1044 ("These policies implicate the questions of when joinder of parties and claims should be allowed, and the proper procedure for handling cases in which numerous parties or claims are involved. Absent an ability to provide for these matters by appropriate rules of procedure, it is possible that vast amounts of judicial, administrative, and private resources would be wasted.").

### 2. *The State's "sovereign immunity" defense cannot first be raised at this late date and was outside the scope of remand.*

The State asserts that it "has not waived its sovereign immunity" from class actions for fee refunds. Although the State frames its argument in terms of sovereign immunity, it is not making a core sovereign immunity claim that the State is immune from suit on a particular claim or issue. Rather, the State appears to be arguing that based on its interpretation of the language of AS 43.10.210(a), plaintiffs are precluded from using one particular means of seeking a tax refund–a class action. Therefore, the State's argument addresses a question of statutory interpretation of the requirements of AS 43.10.210(a), an analysis which necessarily has some sovereign immunity overtones.

We reject the State's argument that it has not waived its "sovereign immunity" claim for two reasons. First, the State failed to raise this argument when the issue of the class's right to a refund was being litigated in the trial court and before us in the first appeal. Prior to the appeal leading to *Carlson I,* the class filed a cross-motion for partial summary judgment seeking a declaration, in principle, that the class was entitled to a refund. The State opposed this cross-motion on several grounds, but not on the ground that AS 43.10.210(a) did not allow refund class actions. After the trial court declined to grant the class's motion, the class appealed the court's refusal to rule that the class was entitled to a refund. Again, the State did not defend on the basis that the statute did not allow class actions for refund claims. We agreed with the class in *Carlson I* that in principle it would be entitled to a refund if there were unconstitutional discrimination, subject to the condition that the statutory protest requirement had

to be either satisfied or waived.[137] Thus, in *Carlson I*, the class prevailed on its argument that it was entitled to a refund if unconstitutional discrimination were found. The State's failure to raise its immunity argument before the superior court and before this court at the time this issue was being litigated precludes the State from raising this defense now.[138]

Second, the State's defense is outside the scope of *Carlson II's* remand. The State maintains that its argument was properly raised because it falls within *Carlson II's* remand order that the superior court "decide whether the filing of this suit constituted notice sufficient to comply with the protest requirement of AS 43.10.210(a)[.]"[139] The State's argument, however, does not address the adequacy of notice or protest. Rather, what the State argues is that the word "taxpayer" in AS 43.10.210(a) does not include a class and that therefore the statute does not permit a class to sue for a tax refund. "When an appellate court issues a specific mandate a trial court has no authority to deviate from it."[140] The State's defense could not have fallen within the scope of *Carlson II's* remand because the State did not argue it before the trial court prior to the final judgment that led to *Carlson II*, nor did the State appeal on this ground in *Carlson II*.

Successive appeals should narrow the issues in a case, not expand them.[141] Other jurisdictions have explicitly ruled that all

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[137] *Carlson I*, 798 P.2d at 1279-80.

[138] *Cf. Univ. of Alaska v. Simpson Bldg. Supply Co.*, 530 P.2d 1317, 1323-24 (Alaska 1975).

[139] *Carlson II*, 919 P.2d at 1344.

[140] *Gaudiane v. Lundgren*, 754 P.2d 742, 744 (Alaska 1988) (citing *King v. Alaska State Hous. Auth.*, 571 P.2d 1010, 1011-12 (Alaska 1977)).

[141] *Cf. Watts v. Seward Sch. Bd.*, 421 P.2d 586, 618 (Alaska 1966) (Rabinowitz, J., dissenting in part and concurring in part), *vacated*, 391 U.S. 592 (1968) (explaining that law of the case doctrine, which prohibits

matters that were or might have been determined in a former appeal may not be presented in a subsequent appeal of the same case.[142] The basis for this rule is that "[j]udicial economy and the parties' interests in the finality of judgments are in no way furthered if parties are allowed to engage in piecemeal appeals."[143] We have expressed a similar rule in the context of res judicata, which involves subsequent suits rather than subsequent appeals.[144] Because it could have been raised in earlier appeals but was not, and because it therefore falls outside the scope of our specific remand in *Carlson II*, we decline to address the State's "sovereign immunity" defense that AS 43.10.210(a) does not permit class actions for fee refunds.

To the extent that the State is arguing that sovereign immunity bars class actions in which the class includes taxpayers who have

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reconsideration of issues that have been explicitly or inherently adjudicated in previous appeal, promotes judicial economy by "narrowing down the issues in successive stages of litigation"); *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) ("By narrowing the issues in successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency.").

[142] *E.g.*, *MacKay v. Hardy*, 973 P.2d 941, 947 (Utah 1998); *Penrich, Inc. v. Sullivan*, 140 N.H. 583, 669 A.2d 1363, 1367 (1995); *Hartford Nat'l Bank & Trust Co. v. Tucker*, 195 Conn. 218, 487 A.2d 528, 530 (1985); *First Am. Nat'l Bank v. Booth*, 270 Ark. 702, 606 S.W.2d 70, 71 (1980); *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 259 N.E.2d 282, 288 (1970); *E.F. Prichard Co. v. Heidelberg Brewing Co.*, 314 Ky. 100, 234 S.W.2d 486, 487-88 (1950); *Montgomery v. Trisler*, 771 N.E.2d 1234, 1239 (Ind. App. 2002); *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 46 P.3d 431, 436 (Ariz. App. 2002); *Baker v. Nat'l State Bank*, 353 N.J. Super. 145, 801 A.2d 1158, 1167 (2002).

[143] *MacKay*, 973 P.2d at 947. *See also First Am. Nat'l Bank*, 606 S.W.2d at 71; *Kazubowski*, 259 N.E.2d at 288; *Bike Fashion Corp.*, 46 P.3d at 436.

[144] *Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 780 (Alaska 2002); *Sengupta v. University of Alaska*, 21 P.3d 1240, 1254 (Alaska 2001).

not met the administrative prerequisite of providing notice via protest, we have already addressed the issues of protest, notice, and division of the class in this opinion. Because the State conceded notice and protest, there was no need for the trial court to address the "sovereign immunity" defense in considering these arguments. Moreover, we have already upheld in this opinion the superior court's treatment of the class as a unified legal entity. Accordingly, we need not address the State's argument in the context of absent class members' refund claims.

### D. The Class May Recover Prejudgment Interest on Any Refund that May Be Due.

In *Carlson II,* we directed the superior court to determine on remand whether prejudgment interest is due under AS 45.45.010.[145] As the superior court correctly noted, AS 45.45.010 "merely sets the maximum rate of interest that may be charged." Consequently, the superior court looked to related statutory provisions to address the prejudgment interest issue. The superior court concluded that because *Carlson I* applied Title 43 as it relates to the allowable statute of limitations,[146] Title 43 should also apply to the question of prejudgment interest. The superior court reasoned that because AS 43.05.280 allows for prejudgment interest for an overpayment of taxes, prejudgment interest should be allowed in the present case.

The State argues that while prejudgment interest is allowed for taxes derived under Title 43, it is not allowed for taxes derived under Title 16, which is the title authorizing the commercial fishing fees. Noting again the importance of construing waivers of sovereign immunity strictly, the State proceeds to discuss a wide range of cases holding that waivers of sovereign immunity

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[145] 919 P.2d at 1344.

[146] *See* 798 P.2d at 1280.

imposing monetary liability on the federal or state government must be narrowly interpreted.[147] We have expressed similar sentiments, holding that "only the legislature has the power to direct the assessment of interest against the sovereign"[148] and that "except where the constitution directs otherwise, interest may not be assessed against the State except where interest is specifically authorized by the legislature."[149] However, we have also held that "it would be unduly technical to deny [a claimant bringing suit against the state] interest based on a mere matter of form."[150] Furthermore, the Ninth Circuit allowed prejudgment interest under the territorial predecessor to AS 43.10.210(a).[151]

The introductory language of AS 43.05.275, applied to the present case in *Carlson I*,[152] is fundamentally the same as the introductory language at issue here in AS 43.05.280 in that both apply to a tax under this title. It is hard to imagine applying section .275 and not section .280 to the present case even if one interprets the latter more strictly than the former. Alaska Statute

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[147] *See, e.g., Library of Cong. v. Shaw*, 478 U.S. 310, 311 (1986) ("The no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest."), *superseded by statute on other grounds as stated in Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994).

[148] *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1245 (Alaska 1974).

[149] *Danco Exploration, Inc. v. State, Dep't of Natural Res.*, 924 P.2d 432, 434 (Alaska 1996).

[150] *Id.*

[151] *Mullaney v. Hess*, 189 F.2d 417, 420 (9th Cir. 1951).

[152] 798 P.2d at 1280.

43.05.280 applies to all overpayment of taxes under Title 43.[153] This statutory section should therefore apply to the provisions for recovery of overpayments laid out in AS 43.10.210. Because AS 43.05.280 serves as the primary justification for providing the class with a refund, the prejudgment interest available under AS 43.10.210 in other actions extends to the recovery of prejudgment interest for overpayment of commercial fishing fees, even though these are ostensibly created under Title 16.[154]

## V. CONCLUSION

We have previously addressed the constitutionality of charging nonresidents more than residents for commercial fishing licenses and entry permits. The class has failed to present any valid arguments as to why we should reconsider this position. We therefore AFFIRM the formula adopted in *Carlson II* for calculating the maximum allowable fee differential for nonresidents. We further AFFIRM the holding of the superior court adopting the State's methodology for calculating direct and indirect costs associated with fisheries management. We AFFIRM the exclusion of general government expenditures and forgone revenues from fishing, but we REVERSE and REMAND on the issue of the hatcheries loan fund subsidy, and we partially REMAND on the issue of capital costs. We conclude that the State has waived its objection to the protest and notice requirement of AS 43.10.210(a), as well as a related sovereign immunity claim. We AFFIRM the decision of Judge Michalski that the refund applies to unnamed class members. Finally, we

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[153] AS 43.05.280(a) provides: "Interest shall be allowed and paid on an overpayment of a tax under this title at the rate and in the manner provided in AS 43.05.225(1)."

[154] We are not here ruling on whether the class will be due a refund upon remand. Rather, we are only stating that if upon remand it is determined that a refund is due, prejudgment interest can be obtained on that refund.

hold that the class may recover prejudgment interest if it obtains a refund on remand.

Superior Court for the State of Alaska
Third Judicial District at Anchorage

**Donald H. CARLSON; Warren Hart; Gerard Haskins; Earl Weese, and Lyla C. Weese Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Plaintiffs,**

**v.**

**STATE of Alaska, COMMERCIAL FISHERIES ENTRY COMMISSION, Defendant.**

**Superior Court**
**Case No. 3AN-84-5790 CI.**

## Findings of Fact and Law

In a trial held June 12-14, 2000, the defendant ("State") presented methodologies for calculating the values of components in the formula announced by the Alaska Supreme Court in Carlson v. State, 919 P.2d 1337 (Alaska 1996). The Court makes the following findings about the State's methodologies.

**"Fisheries budget" component.**

The Court agrees with the State that "direct operating expenditures" and "indirect operating expenditures" should be counted in the "fisheries budget." It finds that the State's methodologies for valuing those subcomponents are appropriate. Thus, for FY 96, the Court finds that the State's "direct operating expenditures" were $126,099,100, the State's "indirect operating expenditures" were $1,189,900, and the State's total "fisheries budget" was $127,289,000.

The Court agrees with the class that all the other subcomponents, including "general government expenditures," "capital costs," the "hatchery loan fund subsidy," and the "foregone revenue from fishery resources," should not be counted in the "fisheries budget" component.

**"Alaska population" component.**

The parties agreed that the value for this component should be based on Alaska's population as it is estimated for each year by the Alaska Department of Labor. The Court finds that this is an appropriate method for valuing this component. Thus, for FY 96, the Alaska population was 605,212.

**"Percentage of state budget from oil revenues" component.**

The Court agrees with the State that "oil revenues" include general fund petroleum revenues, the draw on the constitutional budget reserve, and the net income from the Alaska Permanent Fund appropriated each year. The State's Exhibit H correctly depicts the "petroleum derived revenues" for this component. For FY 96, the percentage of the state budget from oil revenues was 74%.

**Maximum fee differential for FY 96.**

When the figures above are applied to the Carlson formula, the resulting maximum fee differential for fiscal year 1996 is $155.64.

This concludes the Court's rulings. The parties will confer about where to go from there. They will appear before the Court in a teleconference at 1:45 PM on August 18th to discuss the next steps in this case.

Approved as to form and content: /s/
Loren Domke,
Attorney for plaintiff
class
Date: August 1, 2000

/s/
Stephen M. White,
Attorney for defendant
State
Date: August 1, 2000

**ORDER**

**IT IS SO ORDERED.**

DATED: August 8, 2000

/s/
Peter A. Michalski
Superior Court Judge

919 P.2d 1337

Supreme Court of Alaska.

**Donald H. CARLSON; Warren Hart; Gerard Haskins; Stephen R. Libby, Earl Weese, and Lyla C. Weese Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Appellants,**

**v.**

**STATE of Alaska, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellee.**

**No. S-6590.**

June 21, 1996.

Before: RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

***OPINION***

COMPTON, Justice.

## I. INTRODUCTION

This is the second appeal from a class action challenging the State of Alaska's practice of charging nonresident commercial fishers licensing and limited entry permit fees which are three times greater than the fees charged resident commercial fishers. The class is comprised of "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the State for commercial or gear licenses or permits." *Carlson v. State,* 798 P.2d 1269, 1270 (Alaska 1990) (*Carlson I*). In this appeal the class challenges the superior court's grant of summary judgment to the State. The class contends that the superior court misinterpreted our mandate on remand and that the fee differential violates the Commerce

Clause[1] and Privileges and Immunities Clause[2] of the United States Constitution. We reverse and remand.

## II. FACTS AND PROCEEDINGS

This appeal, like *Carlson I,* contests the constitutionality of AS 16.05.480, AS 16.43.160 and Alaska Administrative Code (AAC) 20.05.240.[3] Under AS 16.05.480 a resident pays $30 per year for a commercial fishing license, while a nonresident pays $90 per year for the same license. Similarly, under 20 AAC 5.240(a) (1)-(4) nonresidents pay three times more for limited entry permits. The fee for limited entry permits is determined by the value of the permit;[4] the fee range, for residents, is from $50 to $250.[5] *See* 20 AAC 5.240(a) (1)-(4).

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[1] The United States Constitution provides: "The Congress shall have power... To regulate commerce with foreign nations, and among the several States and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

[2] The Privileges and Immunities Clause of United States Constitution provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. Const. art. IV, § 2.

[3] AS 16.43.160 is the authority under which the Commercial Fisheries Entry Commission (CFEC) adopted 20 AAC 5.240.

[4] The profitability of the different fisheries, and hence the value of permits, varies dramatically. For example, the average gross earnings per permit for the Chignik salmon seine fishery ranged from $88,709 to $265,525 for the years 1983 through 1993. The permit fee for this fishery is $250 for residents and $750 for nonresidents. During the same time period the average gross earnings per permit for the Bristol Bay herring spawn on kelp fishery ranged from $847 to $1613. The permit fee for this fishery is $50 for residents and $150 for nonresidents.

[5] The State notes that there is no evidence that this fee differential has discouraged nonresidents from participating in Alaska's commercial fisheries. During the period between 1982 and 1992 the participation of nonresidents in Alaska fisheries continued to increase. The State also emphasizes that virtually every state that has a commercial fishing industry has higher nonresident licensing and permitting fees. In many of

In *Carlson I* the class alleged: (1) violations of the Privileges and Immunities Clause and Commerce Clause; and (2) the absence of State statutory authority to charge this type of fee differential prior to January 1983. We rejected the class's second contention that the statute did not authorize the 3:1 differential prior to 1983. *Carlson I,* 798 P.2d at 1278-79. However, as to the first issue we remanded the case and imposed on the State the burden of persuasion in defending the Commerce Clause and Privileges and Immunities challenges. *Id.* at 1274-78. With regard to the Privileges and Immunities Clause question we held:

> Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are *prima facie* a violation of it. . . . Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal.

*Carlson I,* 798 P.2d at 1274 (citations omitted). In imposing the burden of persuasion on the State on this issue we adopted the Wisconsin Supreme Court's analysis. *See Taylor v. Conta,* 106 Wis. 2d 321, 316 N.W.2d 814, 823 n.17 (1982). In doing so we held that "the burden of persuasion to demonstrate justification is properly on the state."[6] *Carlson I,* 798 P.2d at 1276.

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these states the differential between resident and nonresident fees exceeds the one contested here.

[6] We similarly imposed the burden of proof on the Commerce Clause challenge on the State. We held: [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be

We framed the issue on remand as, "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I,* 798 P.2d at 1278. We also held that the revenues derived by the State from petroleum production are "analytically[ ] equivalent to 'taxes which only residents pay.'" *Carlson I,* 798 P.2d at 1278.

On remand the parties cross-moved for summary judgment, each proposing a different method by which to compare the fees being paid by nonresidents with the expenditures of state revenues to which the nonresidents make no contribution (the costs to residents). The class proposed what it termed the *per capita* formula. The *per capita* formula computes the contribution made by each resident to the cost of maintaining the commercial fisheries and compares this with the fee differential. The State proposed what it termed the *pro rata* formula. The *pro rata* formula in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by nonresidents. The superior court concluded that under this method of analysis, residents paid by way of taxes (or their analytical equivalent) substantially more than nonresident fishers paid. In reaching this conclusion, the superior court applied the State's proposed formula to the categories of expenses accepted by us in *Carlson I.*[7] As the licensing and permitting fees charged

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served as well by available nondiscriminatory means. *Carlson I,* 798 P.2d at 1277 (quoting *Maine v. Taylor,* 477 U.S. 131, 138 (1986)).

[7] The State presented additional budget figures which included an analysis of every state agency for the years 1981 through 1993. The State claims that these figures included expenditures to which only Alaska residents contributed and which benefitted only commercial fishers. The class requested a stay and a reopening of discovery to address these new figures. The superior court determined that as it had not relied on the new

nonresidents did not exceed the amount paid by residents, the superior court concluded that the differential did not violate either the Commerce Clause or the Privileges and Immunities Clause. The class appeals.

## III. DISCUSSION

### A. Standard of Review

Both parties correctly argue that the Commerce Clause and the Privileges and Immunities Clause challenges to AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 present questions of constitutional law which we review *de novo*. *See Wright v. Black*, 856 P.2d 477, 479 (Alaska 1993). The issue of whether the superior court erred in adopting the *pro rata* formula to calculate the contribution to commercial fisheries management made by residents is also an issue of law which we review *de novo*. *Langdon v. Champion*, 745 P.2d 1371, 1372 n.2 (Alaska 1987).

### B. The Challenged Fee Differential under the Commerce Clause

The class contends that two recent Supreme Court decisions require that the different fees charged to residents and nonresidents under AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 be analyzed under the Commerce Clause.[8] *See Oregon*

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figures in granting summary judgment, any dispute over these figures was moot. However, the court did reserve the right to reconsider this decision if this court determined that the class's *per capita* method should have been employed.

[8] In *Carlson I* we left open the question of whether this case was governed by the Commerce Clause. We noted that earlier Supreme Court cases had suggested that the Commerce Clause does not apply to fish until the fish are actually harvested. *Carlson I*, 798 P.2d at 1276 n.4 (citing *McCready v. Virginia*, 94 U.S. 391, 396 (1876); *Toomer v. Witsell*, 334 U.S. 385, 394-95, *reh'g denied*, 335 U.S. 837 (1948)).

*Waste Systems v. Dep't of Envtl. Quality,* 511 U.S. 93, __, 114 S. Ct. 1345, 1350 (1994); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334 (1992). The class argues that the fee differentials in these statutes and regulations violate the negative Commerce Clause.[9] The class argues AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 are *per se* invalid under the Commerce Clause. A substantial portion of the class's briefs is devoted to analogizing the different commercial licensing and permit fees charged residents and nonresidents to surcharges the states of Oregon and Alabama imposed on out-of-state waste. The Supreme Court struck down these surcharges. *Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1355; *Chemical Waste,* 504 U.S. at 334. The class contends that under the reasoning employed in *Oregon Waste Systems* and *Chemical Waste,* the 3:1 fee differential is tantamount to "differential

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[9] The grant of regulatory power to Congress implicit in the Commerce Clause has been interpreted to have a "negative" aspect "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, __, 114 S. Ct. 1345, 1349 (1994) (citing *Wyoming v. Oklahoma,* 502 U.S. 437 (1992)). A negative Commerce Clause analysis has two steps. First, the court must determine whether the challenged statute discriminates against interstate commerce or "regulates evenhandedly with only 'incidental' effects on interstate commerce." *Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1350 (citations omitted). Second, "[i]f the restriction is discriminatory– *i.e.,* favors in-state economic interests over their out-of-state counterparts–it is virtually *per se* invalid." *Id.* at __, 114 S. Ct. at 1347. A restriction found to be *per se* invalid must be struck down unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at __, 114 S. Ct. at 1351 (citations omitted). The justifications for a discriminatory tax or restriction must pass the strictest scrutiny. *Id.* at __, 114 S. Ct. at 1351. However, if the restriction is nondiscriminatory it is valid unless the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)).

treatment of in- state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1350.

*Oregon Waste Systems* does not require that the fee differential challenged herein be evaluated under the Commerce Clause. In both *Oregon Waste Systems* and *Chemical Waste,* the Court found taxes imposed on out-of- state waste which were greater than the taxes imposed on in-state waste violated the negative Commerce Clause. In applying the negative Commerce Clause analysis in *Oregon Waste Systems,* the Court emphasized that the Commerce Clause prohibits states from unjustifiably discriminating against or burdening the interstate flow of *articles of commerce. Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1349. The Court went on to hold that "[i]t is well-established, however, that a law is discriminatory if it 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1350 (quoting *Chemical Waste,* 504 U.S. at 342).

Unlike the fee differentials in *Oregon Waste Systems* and *Chemical Waste,* the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits. The Supreme Court has consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses.[10] In *Toomer v. Witsell,* 334 U.S. 385 (1948), the

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[10] *See United Bldg. & Const. v. Mayor & Council of Camden,* 465 U.S. 208, 215-19 (1984) (analyzing a municipal resident hiring preference under the Privileges and Immunities Clause); *Hicklin v. Orbeck,* 437 U.S. 518, 524 (1978) (evaluating under the Privileges and Immunities Clause the Alaska Hire Law which preferenced Alaska residents in hiring); *Sosna v. Iowa,* 419 U.S. 393, 406 (1975) (reviewing Iowa's durational residency

Court evaluated South Carolina shrimping license fees, which were one hundred times greater for non-residents than for residents, under the Privileges and Immunities Clause. There the Court observed that the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[11] *Toomer,* 334 U.S. at 395.

### C. The Challenged Fee Differential Under the Privileges and Immunities Clause

The class contends also that the nonresident fee differential violates the Privileges and Immunities Clause of the United States Constitution. The Privileges and Immunities Clause is not absolute. "[I]t does not preclude disparity of treatment [of citizens of other states] in the many situations where there are perfectly valid independent reasons for it." *Toomer,* 334 U.S. at 396. A claim that a residency classification violates the Privileges and Immunities Clause requires a two- step inquiry:

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requirement for divorces under the Privileges and Immunities Clause); *see also Baldwin v. Fish & Game Comm'n of Montana,* 436 U.S. 371, 383 (1978) (stating that the Privileges and Immunities Clause "has been interpreted to prevent a State from imposing unreasonable burdens on Citizens of other States in their pursuit of common callings within the State" (citations omitted)).

[11] In *Anderson v. Mullaney,* 191 F.2d 123 (9th Cir. 1951), *aff'd* 342 U.S. 415 (1952), the Ninth Circuit struck down on Commerce Clause grounds an Alaska territorial statute which charged non-resident fishermen a higher license fee than resident fishermen. On certiorari the Supreme Court affirmed on Privileges and Immunities rather than Commerce Clause grounds, following *Toomer v. Witsell.* Assuming that the Commerce Clause would also apply to cases of this nature, it is difficult to believe that a license fee differential which passes muster under the Privileges and Immunities analysis would nonetheless be an unconstitutional discrimination against interstate commerce.

> First, the activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause. . . .
>
> Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest.

*Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 64-65 (1988) (internal quotations and citations omitted).

We determined in *Carlson I* that commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause. 798 P.2d at 1274. However, the class claims that for us to find for the State on the relatedness prong of the inquiry, the State "must demonstrate that behind the nonresident surcharge or differential is a[sic] (1) substantial reason advancing a legitimate State policy and (2) the means employed by the statutory scheme must be closely tailored and have a substantial relationship to a legitimate interest served by the statute." Appellant's Brief at 27.

We have already made the first inquiry. In *Carlson I,* we held that equalizing the burden of fisheries management, "where residents pay proportionately more in foregone benefits than nonresidents for fisheries management," was a substantial State interest. *Id.* at 1278. However, we concluded that the record did not contain sufficient evidence to determine whether the differential in fees charged residents and nonresidents was sufficiently related to this interest to justify such disparate treatment. *Id.* at 1278.

The class questions the relatedness of the fee differential to the burden of fisheries management borne by residents. It analogizes this case to other Supreme Court cases, and challenges our conclusion in *Carlson I* that petroleum revenues are the analytical

equivalent of taxes. The class argues that *Oregon Waste Systems* prohibits the State from arguing that the fee differentials do not discriminate against nonresidents because they merely impose on nonresidents their share of the costs of fisheries management. It claims that under the reasoning of *Oregon Waste Systems,* neither general tax revenues nor oil royalty revenues can be viewed as the residents' contributions to fisheries management.[12]

There are two flaws with the class's argument. First, *Oregon Waste Systems* was a Commerce Clause case. *See Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1349. Although the reasoning in Privileges and Immunities Clause cases has been used in Commerce Clause cases, it is not analytically sensible to do the reverse in this case. In this case the Privileges and Immunities Clause question turns on whether there is a sufficient relationship between the higher fees charged nonresidents and the State's interest in imposing on nonresidents their share of the costs for managing the State's commercial fisheries. In *Oregon Waste Systems,* the issue was whether the interstate and intrastate taxes are imposed on sufficiently equivalent events such that they could be considered proxies for each other. *See Id.* at __, 114 S. Ct. at 1352-53. These are different inquires for which the analysis is not interchangeable.[13]

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[12] The class calls this its "attribution of tax revenues" argument.

[13] Additionally, the Supreme Court in *Oregon Waste Systems* had reasons other than the disparity between the events being taxed for finding that the Department of Environmental Quality's compensatory tax argument was disingenuous. For example, the Court expressed concern over the fact that the out-of-state surcharge was actually assessed on in-state shippers who already paid Oregon income taxes, the very tax the surcharge supposedly balanced out. *See Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1353.

Second, the class's argument demonstrates a lack of understanding of our holding in *Carlson I.* Contrary to the class's contentions, we did not advocate the kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems.* In *Carlson I* we did not advance a compensatory tax doctrine which would impose on nonresidents their entire share of the costs of commercial fisheries management, while resident fishers' share of these costs was borne by the entire population of the State. Rather, we held that the issue is

> whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

*Carlson I,* 798 P.2d at 1278. The disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries. The fee differential merely balances out "any conservation expenditures from taxes which only residents pay." *Toomer,* 334 U.S. at 399.[14] In *Carlson I* we held that the State bore the burden of persuasion on this issue. 798 P.2d at 1276. This burden should be met by calculating the contribution made by residents and comparing it with the challenged fee differentials.

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[14] In *Oregon Waste Systems,* the Court gave no indication that it intended to cast doubt on this aspect of *Toomer.*

### D. The State's Pro Rata Method of Calculating the Amount Residents Contribute to Fisheries Management

To establish "practical equality" between residents and nonresidents, the State must demonstrate that the higher fees charged nonresidents are equivalent to the burden borne by residents as measured by the "residents' *pro rata* shares of state revenues to which nonresidents make no contribution." *Carlson I*, 798 P.2d at 1278. The *per capita* formula propounded by the class is the correct method for calculating the contribution made by residents.

Under the *per capita* formula the resident contribution is calculated in the following manner: (Fisheries Budget/ Alaska Population) X (percentage of State Budget from oil revenues/1.0). *See Appendix A.* Once this computation is made the resident contribution can be compared to the difference in fees paid by nonresidents to determine if the fee differential is constitutional.

The State advocates a different formula for computing the resident contribution. The State's formula utilizes a three-step approach. The State would (1) calculate the expenditures or costs of the commercial fisheries (enforcement and conservation); (2) determine the resident and nonresident commercial fishers' respective *pro rata* shares of those expenditures; and (3) compare the percentage of its respective *pro rata* share each group is paying. *See Appendix A.*

The State's formula differs from the class's when it comes to deciding how to determine the numbers to be used in steps two and three. Although the formulae are theoretically different and are calculating different quantities, the significant difference between the two proposed formulae concerns how the residents' *pro rata* share is calculated. As discussed above, the class

argues that the amount used as the divisor of the commercial fisheries expenditures from taxes which only residents pay must be the total number of Alaskans. It correctly asserts that using this number will allow the court to determine the *per capita* contribution actually being made by each of the resident permit holders. On the other hand, the State argues that the holdings in *Toomer* and *Carlson I* mandate that the residents' contribution should be determined by dividing the fisheries' expenditures from taxes by the number of resident permits issued in any given year.[15] The State is wrong. As stated above, in *Carlson I* we held that the relevant inquiry was "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I,* 798 P.2d at 1278. Thus, we ordered the superior court to compare the relative burden placed on resident and nonresident commercial fishers. The *per capita* method does just this. Had *Carlson I* mandated a comparison of the expenditures made by the State to the contribution made by nonresident fishers, the State's theory would be correct.[16] Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State services. It is this quantity which must be equivalent to the fee differential for the fees to be

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[15] This is not exactly accurate because the State's formula never calculates the actual amount that each individual resident is purported to contribute. Rather, the State's formula calculates the percentages of their fair share of costs residents and nonresidents pay.

[16] However, this would be just the kind of compensatory tax rationale which the Supreme Court struck down in *Oregon Waste Systems.*

constitutional under the *Carlson I* analysis. *See Carlson I,* 798 P.2d at 1278.[17]

As we have concluded that the resident contribution must be calculated using the class's *per capita* formula, we remand the case for the application of this formula. If under the formula the fee differential exceeds the resident contribution, the State will have failed to demonstrate that the means employed by its statute have a substantial enough relationship to the legitimate interest of the statute to survive Privileges and Immunities Clause review. Conversely, if the superior court finds that the fee differential is not greater than the resident contribution, the State has successfully carried its burden of proving that the means employed by its statutory scheme are substantially related to the legitimate interest served by the statute. On remand the superior court shall address issues relating to the additional budget figures

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[17] The State also argues that the *per capita* formula should be rejected because it has never been used by any court in any context. The State cites a string of equal protection cases to support this assertion. *See Baldwin,* 436 U.S. 371 (1978); *LCM Enterprises, Inc. v. Town of Dartmouth,* 14 F.3d 675 (1st Cir. 1994); *Johns v. Redeker,* 406 F.2d 878 (8th Cir. 1969). However, these equal protection cases have no bearing on the suitability of the *per capita* approach in this case. In *Baldwin* the comparison being made was between the state's costs for maintenance of the big-game populations, not the contributions made by resident big-game hunters to the maintenance of big-game populations. *Baldwin,* 436 U.S. at 389. Additionally, in *Baldwin* the calculations were being viewed under the rational basis test, a more lenient standard than the intermediate scrutiny required in this case. *Baldwin,* 436 U.S. at 390-91. Similarly, *LCM Enterprises* is inapplicable because it too involved the application of the rational basis test, which only requires that the classification being challenged is rationally related to the legitimate state interest. *LCM Enterprises,* 14 F.3d at 679. *Johns* also has no relevance to the issue at hand because the court in *Johns* does not discuss the method the trial court used to determine the resident contribution which was being compared with the higher fees charged to nonresidents. *Johns,* 406 F.2d at 883.

presented by the State. It will need to determine whether to accept these new figures and decide whether it should grant a stay and reopen discovery in order to allow the class to respond to the State's presentation of these new figures.

### E. Prejudgment Interest of the Unlawful Portion of the License Fees from the Date the Class Action Was Filed

The class seeks a refund under AS 43.10.210,[18] of all unlawfully exacted fees from the date of filing the lawsuit with statutory prejudgment interest calculated under AS 45.45.010. In *Carlson I* we held that AS 43.15.010 would govern any refund in this case, and that if the class succeeded on its constitutional claims it could only recover unlawfully collected fees if it could satisfy the protest requirement of AS 43.15.010. 798 P.2d at 1279-80. We remanded for further findings on whether the State had waived the protest requirement, thereby allowing a refund of all fees not barred by the statute of limitations. *Id.* The superior court found that the State had not waived the protest requirement.

The class admits that it could not have satisfied the protest requirement for the taxes paid prior to the filing of the lawsuit, and thus does not seek a refund of any unlawfully assessed fees paid prior to June 22, 1984. However, the class claims that the filing of the complaint in the case at bar fulfills the protest requirement.

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[18] AS 43.15.010 was renumbered 43.10.210. AS 43.10.210(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax. . . .

Although the State does not address this issue in its brief, the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210. This does not mean that the State concedes that any refund would be due if the class succeeds. The State argued below that it only had conceded that the protest requirement of AS 43.10.210 had been met, and that this "is merely one precondition to the '[r]ecovery of overpayments and protested payments.'" Because the State does not brief this issue, it is impossible to know whether it would still make this argument.

If on remand the superior court determines that the class has prevailed, the superior court must also decide whether the filing of this suit constituted notice sufficient to comply with the protest requirement of AS 43.10.210(a), and whether prejudgment interest is due under AS 45.45.010.

## IV. CONCLUSION

We conclude that this appeal does not implicate the Commerce Clause. We REVERSE the superior court's approval of the State's *pro rata* formula of calculating and comparing the taxation burden placed on resident and nonresident commercial fishers, and we REMAND for application of the class's *per capita* formula. We also order that on remand the superior court address the unresolved issues concerning the appropriate budget items to be considered in determining the State's expenditures (*i.e.*, resident contributions). Additionally, if the superior court finds for the class, it must determine the date from which the class should be given a refund, and what, if any, interest is due on that refund.

## APPENDIX

The following is a comparison of the two proposed formulae which uses the statistics proffered by the State for the years 1982 through 1989. It is difficult to compare the State's and class's formulae because they calculate and compare different quantities in an attempt to measure what residents and nonresidents are paying. The class's formula calculates the fee differential which would be allowable, while the State's formula computes the respective percentages of costs of running the commercial fisheries which residents and nonresidents could pay and still be "treated similarly."

### A. Application of the Class's Per Capita Formula

The class's *per capita* formula: Fisheries Budget/Alaska Population x Percentage State Budget from Oil Revenues.

1982: $29,000,000/500,000[19] x 83% = $48.14

Under the *per capita* formula the allowable fee differential will vary from year to year. For example, in 1982 the difference between a resident and nonresident permit could not substantially

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[19] For the purpose of this example we will assume that the population of Alaska is 500,000.

| | | |
|---|---|---|
| 1983: | $31,000,000 / 500,000 x 81% = | $50.22 |
| 1984: | $34,000,000 / 500,000 x 82% = | $55.76 |
| 1985: | $34,800,000 / 500,000 x 82% = | $57.07 |
| 1986: | $34,500,000 / 500,000 x 86% = | $59.34 |
| 1987: | $29,600,000 / 500,000 x 76% = | $44.99 |
| 1988: | $29,300,000 / 500,000 x 83% = | $48.64 |
| 1989: | $29,900,000 / 500,000 x 82% = | $49.04 |

exceed $48.14, while in 1986 the difference could not substantially exceed $59.34.

### B. Application of the State's Pro Rata Formula

The State's formula calls for the comparison of two calculations: (1) Fair Share of Resident Costs = (Residents' Pro Rata Share)[20] x (Fisheries Budget x Percentage of State Revenue from Oil); and (2) Fair Share Nonresident Costs = (Nonresidents' Pro Rata Share)[21] x (Fisheries Budget x Percentage of State Revenue from Oil).

The following two tables are the application of these formulae.

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[20] Residents' Pro Rata Share: (Percentage of Permits Held by Residents) x (Fisheries Budget).

[21] Nonresidents' Pro Rata Share: (Percentage of Permits Held by Nonresidents) x (Fisheries Budget).

Percentage of State's Commercial Fishery Expenditures Paid By Residents:

| | Fiscal Year | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 |
| Column 1<br>% of Limited Entry Permits Held By Residents | 83% | 84% | 85% | 84% | 84% | 82% | 82% | 82% |
| Column 2<br>Total Expenditures By Four Agencies For Commercial Fishery Management | $29.0 | $31.0 | $34.0 | $34.8 | $34.5 | $29.6 | $29.3 | $29.9 |
| Column 3<br>Resident's Pro Rata Share of Total Expenditures | $24.1 | $26.0 | $28.9 | $29.2 | $29.0 | $24.3 | $24.0 | $24.5 |
| Column 4<br>% of The Total State Revenues To Which Nonresidents Make No Contribution | 83% | 81% | 82% | 82% | 86% | 76% | 83% | 82% |
| Column 5<br>Residents' Pro Rata Share of Expenditures From Revenues To Which Nonresidents Make No Contribution | $20 | $21.1 | $23.7 | $23.9 | $24.9 | $18.5 | $19.9 | $20.1 |
| Column 6<br>Residents' Fees Paid For Licenses and Permits | 1.3 | 1.3 | 1.2 | 1.5 | 1.5 | 1.7 | 2.0 | 2.0 |
| Column 7<br>Total Amount Paid | $21.3 | $22.4 | $24.9 | $25.4 | $26.4 | $20.2 | $21.9 | $22.1 |

| | Fiscal Year | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 |
| By Residents To Participate in Commercial Fisheries | | | | | | | | |
| Column 8 % Space Paid By Residents of Their Pro Rata Share of State Expenditures For Commercial Fisheries | 88% | 86% | 86% | 87% | 91% | 83% | 91% | 90% |

Percentage of State's Commercial Fishery Expenditures Paid by Nonresidents:

| Year | Column 1 % of Limited Entry Permits Held By Nonresi-dents | Column 2 Total Expend-itures By Four Agencies For Commer-cial Fishery Manage-ment | Column 3 Nonresi-dents' Pro Rata Share of Total Expend-itures | Column 4 Nonresi-dents's Fees Paid For Licenses and Permits | Column 5 % Paid By Nonresi-dents of Their Pro Rata Share of State Expend-itures For Commer-cial Fisheries |
|---|---|---|---|---|---|
| 1982 | 17% | $29.0 | $4.9 | $1.3 | 27% |
| 1983 | 16% | $31.0 | $5.0 | $1.2 | 24% |
| 1984 | 15% | $34.0 | $5.1 | $1.0 | 20% |
| 1985 | 16% | $34.8 | $5.6 | $1.2 | 21% |
| 1986 | 16% | $34.5 | $5.5 | $1.3 | 24% |
| 1987 | 18% | $29.6 | $5.3 | $1.6 | 30% |
| 1988 | 18% | $29.3 | $5.3 | $2.3 | 43% |
| 1989 | 18% | $29.9 | $5.4 | $2.2 | 41% |

Under the *pro rata* formula the differential is constitutional as long as the percentage of fair costs nonresidents are paying does not exceed the percentage of fair costs that residents are paying.

Thus, the fee differential was constitutional in 1983 because residents paid 86% of their share and nonresidents only paid 24% of their share. As stated in the text of the opinion, the flaw with this formula is that it treats the resident fishers as if they alone are paying the tax equivalent (percentage of revenues to which nonresidents make no contribution). For this formula to accurately calculate the resident fishers' contribution, it would need to divide the residents' *pro rata* fair share by the population of Alaska and then multiply by the number of resident fishers.

RABINOWITZ, Justice, dissenting.

The majority concludes that since *Oregon Waste Systems v. Department of Environmental Quality,* 511 U.S. 93 (1994), was decided under the Commerce Clause as opposed to the Privileges and Immunities Clause, its reasoning is inapposite here. I cannot agree.

The United States Supreme Court has long acknowledged "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause–a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism. . . ." *Hicklin v. Orbeck,* 437 U.S. 518, 531-32 (1978). It has, in fact, endorsed the methodology of referring to Commerce Clause precedent in deciding claims based solely on the Privileges and Immunities Clause. *Id. See also Sestric v. Clark,* 765 F.2d 655, 664 (7th Cir.1985) ("The two clauses are part of the same document, drafted by very intelligent and careful men; why would they have wanted the same discrimination against nonresidents to be tested by a different standard, depending on which clause was cited in the complaint?").

I do not mean to suggest that the two clauses are completely interchangeable. The differences between them, however, appear to primarily involve matters of scope as opposed to

content. For example, the market regulator–market participant doctrine can shield a state from Commerce Clause attack but not from a claim based on the Privileges and Immunities Clause. *United Bldg. & Constr. Trades Council v. Mayor,* 465 U.S. 208, 221-22 (1984). On the other side of the equation, the Commerce Clause protects corporations, while the Privileges and Immunities Clause does not. *Paul v. Virginia,* 75 U.S. (8 Wall) 168, 19 L.Ed. 357 (1869).

In this way discrimination predicated somehow on state affiliation can fall within the scope of the Privileges and Immunities Clause alone, the Commerce Clause alone, both clauses, or, for that matter, neither.[1] Once it has been determined that a discriminatory policy falls within the purview of one or both of these clauses, however, I am not persuaded that the methodology of the two should diverge in any significant respect. The extent to which the interpretation of these two clauses has historically been interwoven confirms this assessment.

Further, the level of scrutiny triggered by a discriminatory policy that falls within the scope of either of these clauses appears to be very nearly identical. Professor Tribe has observed that the standard of review employed in Privileges and Immunities cases is "almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."[2] Similarly, in *Oregon Waste Systems,* the Supreme Court observed that

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[1] A well-recognized example of this last category would be a policy of discriminating against nonresidents in the granting of recreational game or fishing license fees. This kind of state discrimination does not implicate the Commerce Clause since it does not significantly burden interstate commerce, and it does not implicate the Privileges and Immunities Clause because it does not involve a fundamental right. *See, e.g., Baldwin v. Fish and Game Comm'n of Montana,* 436 U.S. 371 (1978).

[2] Lawrence H. Tribe, *American Constitutional Law* § 6-35, at 544 (2d ed.1988).

Commerce Clause cases "require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.'" *Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1351. Under both clauses, the burden is placed on the state to provide a sufficient justification for its discriminatory policy.

Considering the significant similarities between the two clauses, it not surprising that in *Carlson I* we simply referenced our Privileges and Immunities Clause analysis in order to dispose of the Commerce Clause issue, concluding that "[t]he analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated." *Carlson I,* 798 P.2d at 1276. Indeed, we went on to state that "[i]t would be anomalous . . . to conclude that a law facially discriminating against interstate commerce could pass muster under the Privilege and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation." *Id.* at 1277 n.5. In the wake of the United States Supreme Court's ruling in *Oregon Waste Systems,* however, the majority has reconsidered this position and concluded that, in fact, "the analysis is not interchangeable."

It is obvious that the fee discrepancy in this case implicates the Privileges and Immunities Clause. The policy is facially discriminatory, and it impairs an interest that is "fundamental" for purposes of Privileges and Immunities Clause analysis. Given the exceptionally close relationship between this clause and the Commerce Clause, I cannot, as noted above, join in the majority's summary rejection of the United States Supreme Court's reasoning in *Oregon Waste Systems.*

The justification offered by Oregon for discriminating against out-of-state interests in *Oregon Waste Systems* is very similar, if not identical, to the justification advanced by the State in the case at bar. The primary rationale is that out-of-state interests ought

to be made to bear their "fair share" of the costs that their activities impose on the state. *Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1351; *Carlson I,* 798 P.2d at 1272. In both cases, the "share" or contribution of in-state interests is augmented by general state tax revenues, or their analytical equivalent, in order to justify the tax or fee discrepancies.[3]

In *Carlson I,* we concluded that this kind of augmentation was acceptable under the holding of *Toomer v. Witsell,* 334 U.S. 385 (1948). In *Toomer,* the Supreme Court stated, in dicta, that a state could "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Id.* at 399. The Supreme Court in *Oregon Waste Systems,* however, expressing its reluctance to "plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events[,]" explicitly rejected this type of justification for state discrimination in the Commerce Clause context. *Oregon Waste Systems,* 511 U.S. at __, 114 S. Ct. at 1353 (citations and internal quotation marks omitted).

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[3] Although the majority asserts that the fee-shifting we authorized in *Carlson I* is not the same kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems,* I think that the similarities between the two far outweigh any potential differences. The approach authorized by the majority seems to place greater emphasis on the theoretical equality of individual contributions than the Oregon tax did. There is, however, no indication that the Oregon tax was designed to impose on out-of-state interests their "entire share" of solid waste disposal costs nor, for that matter, that the shares of disposers of in-state waste, who paid an $0.85 per ton fee, were to be borne by the entire population. More importantly, the decision in *Oregon Waste Systems* did not turn on the fact that the surcharge was excessive but rather on the conclusion that any surcharge was constitutionally offensive under the circumstances. Consequently, the majority's endorsement of the class's *per capita* approach does not sufficiently distinguish the fee discrepancies here from those in *Oregon Waste Systems.*

The majority correctly observes that the compensatory tax doctrine, focusing on whether or not the taxes which allegedly cancel each other out are imposed on "substantially equivalent events," finds its origins in Commerce Clause cases. It does not follow from this observation, however, that the doctrine has no place in Privileges and Immunities analysis. There is nothing inherent in this doctrine, or the policy concerns behind it, that indicates that it should only apply to discriminatory state taxation challenged under the Commerce Clause.

In *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984), the Supreme Court struck down a discriminatory tax on the grounds that "manufacturing and wholesaling are not 'substantially equivalent events'" on which compensating taxes might be imposed. *Id.* at 643. In that case, West Virginia had imposed a wholesale gross receipts tax from which local manufacturers were exempt. The policy underlying the exemption was that it would put in-state manufacturers who were wholesaling their products in West Virginia on equal footing with their out-of-state competitors who were functionally exempt from West Virginia's manufacturing tax.[4] The Court rejected this justification, observing that

> [i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers–which they have every right to do–then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

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[4] Presumably the only reason that the Privileges and Immunities Clause was not invoked in this case–where it would seem to be a natural choice–is that the plaintiff was a corporation not entitled to protection under that clause. As such, the *Armco* case provides an excellent example of how the "substantially equivalent events" test should apply with equal force regardless of which clause is invoked.

*Id.* at 644.

Likewise, the Supreme Court in *Oregon Waste Systems* observed that Oregon's compensatory tax theory "ignore[s] the fact that shippers of waste from other States in all likelihood pay income taxes in other States, a portion of which might well be used to pay for waste reduction activities in those States." *Oregon Waste Systems,* 511 U.S. at __ n.7, 114 S. Ct. at 1353 n.7.

In this respect the "substantially equivalent events" test essentially serves to identify a significant logical flaw that often infects "fair share" justifications for discriminatory taxes. I can see no reason to assume that this flaw is any less serious when it is exposed through litigation based upon the Privileges and Immunities Clause than it is when challenged under the Commerce Clause.[5]

The justification advanced by the State in this case suffers from precisely the same defect alluded to in both *Armco* and *Oregon Waste Systems.* Specifically, a fisher from Oregon who purchases a commercial license in Alaska will no doubt be under an obligation to pay Oregon income taxes, a portion of which

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[5] A commentator has observed:

> While differences exist between the purposes and functions of the two constitutional clauses, they clearly exert overlapping spheres of influence. To hold the same tax invalid under one clause because it does not meet the substantially equivalent events requirement of the compensatory tax test, but valid under the other clause because it is important ... that a state have power to preserve and regulate the exploitation of an important resource through means of a functionally compensatory tax, is surely to elevate form over substance.

Jeffrey J. Lamontagne, Note, *Oregon's Wasted Effort: The Supreme Court's Inability to Adapt its Compensatory Tax Doctrine to Solid Waste Regulations,* 19 Wm. & Mary Envtl. L. & Pol'y Rev. 345, 360 (1995) (citations and internal quotation marks omitted).

probably will have been used for conservation costs in that state. Accordingly, the fee discrepancy places the Oregon fisher, as a nonresident, at a competitive disadvantage. In other words, both the Alaska fisher and the Oregon fisher are obliged to contribute to a general tax fund[6] from which their respective States may draw monies to support local fisheries, but only the Oregon fisher is being called upon to pay enhanced fees.

Restating our holding in *Carlson I,* the majority concludes that "[t]he disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries." Implicit in this analysis is that a share of this state's petroleum revenues, the analytical equivalent to general tax revenues, should be attributed to the resident fishers in calculating their contribution. Since I believe that the United States Supreme Court's holding in *Oregon Waste Systems* effectively forecloses this method of justifying a discriminatory tax, I cannot agree.

On the basis of the Supreme Court's reasoning in *Oregon Waste Systems,* I conclude that the fee discrepancies authorized by AS 16.05.480, AS 16.43.160 and 20 AAC 05.240 violate the Privileges and Immunities Clause of the Constitution of the United States of America.

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[6] The Alaskan fisher "contributes" in the form of foregone benefits from petroleum revenues.

**IN THE SUPERIOR COURT FOR TIIE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE**

| | | |
|---|---|---|
| DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Plaintiffs, | ) | |
| vs. | ) | CaseNo.3AN-84-5790 Civil |
| STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Defendant. | ) | |

**DECISION AND FINAL ORDER ON RECONSIDERATION OF THE COURT'S AUGUST 12, 1993 ORDER AND FINAL DECISION GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT**

The Supreme Court remanded this ease to the superior court by a decision October 5, 1990. The Court's direction to the superior court was to have further proceedings consistent with the opinion issued. The opinion issued affirmed the trial court in part, and reversed the trial court in part.

The Supreme Court affirmed the trial court's rejection of plaintiffs' contention that the a 3:1 fee ratio was not authorized by statute prior to 1983; it reversed the trial court's ruling that the

class would not be able to obtain a refund in any event, and directed the trial court to decide whether the state waived the otherwise necessary protest (the trial court having since ruled that the State did not waive the protest requirement) and limited to two years the statute of limitations applicable, if the necessary protest of tax or a waiver of the protest requirement was made.

The Supreme Court also reversed the trial court's determination that summary judgment should be granted to the State of Alaska as to Privileges and Immunities and Commerce Clause challenges. The test the trial court is to apply regarding these clauses is "whether residents and similarly situated non-residents are being treated with substantial equality." Non-residents may be charged higher fees to make up for costs not paid for by the resident's fee rate, but paid by the residents through other taxes or their economic equivalent.

On remand the court granted summary judgment, and then granted reconsideration, which placed the motion for summary judgment back before the court.

Then the case was reassigned to the undersigned in June 1993, at which point the trial court reviewed the file and after various status hearings made the ruling that in calculating the amount of supplemental fee that the Constitution would allow the State to charge a given non-resident the proper method was to divide the total resident-only taxes (or their equivalent) spent on the commercial fishery by the population of Alaska. To this the State sought reconsideration, the court sought the class's input, and that issue is before this court to resolve by this decision.

After the trial court's ruling greatly enlarging the "divisor," the State prepared a full study of all state expenditures made in support of commercial fishing as well as additional "foregone benefits" contributed to the commercial fisheries and included them in the Supplemental Memorandum in Support of Its Motion

for Summary Judgment on Remand filed November 12, 1993. The plaintiff class has opposed the court allowing the State to present additional information about the cost of fishing management. The court ruled that the court would receive additional information related to the cost of the State fishery in its order of August 12, 1993.

## DECISION UPON RECONSIDERATION OF THE COURT'S AUGUST 12, 1993 RULING

The court has considered the parties' arguments regarding the proper divisor to use in calculating the acceptable discrepancy between resident and non-resident fees for fishers and HEREBY VACATES its prior ruling that *pro rata* as used in *Carlson* vs *State,* 798 P.2d 1269 (Alaska 1990), means *per capita.*

If the theoretical basis allowing higher fees for non-residents is the recovery of costs related to benefits provided, then the costs are properly divided by the number of users. Using a *per capita* approach, such costs could *never* be recovered in a limited entry fishery. Though recovery of 100% of costs is only theoretical, a *per capita* limitation makes no sense. For example, if *all* the fishers were non-residents, it would be necessary to have as many fishers as there are Alaskans in order to achieve fair contribution by the non-resident fishers.

The State's citation to the tuition cases also convinces the court that its August 12, 1993, ruling was in error and that the proper division of the costs of management paid only by residents by taxes and benefits foregone ought to be the number of fishers, not the number of Alaskans.

## THE MOTION FOR SUMMARY JUDGMENT

Given the court's decision that it is the number of users which determines the *pro rata* cost of the benefits received it is evident that the disparity between resident and non-residcnt fees for commercial fishing licenses and permits is not in violation of the Privileges and Immunities or Commerce Clauses of the Constitution. Residents pay by way of taxes, or the economic equivalent of taxes, i.e., benefits foregone; substantially more than the non-resident fishers pay toward the benefits received based on the categories of expenses previously accepted by the parties and recognized by the court in *Carlson.* See, State's Supplemental Memorandum of November 1, 1993, pp. 7-8, Figures A, B. The proportion of costs paid by the non-residents regardless of the non-resident differential is always less than the proportion paid by residents. See, State's Memorandum in Support of State's Motion for Summary Judgment, March 5, 1991, pp. 10-19; State's Supplemental Memorandum in Support . . . November 2, 1993, pp. 3-10.

The reconsideration of the August 12, 1993, ruling renders moot the parties' disputes whether the State can include other expenses than those presented at the original summary judgment motion (the court ruled that the State could), whether a stay should be granted to allow additional discovery by the plaintiff class (the court ruled that the stay was denied), and just what, if any, other items presented by the State as support of the fee disparity should be recognized by the court.

It is this last area of contention that the court will address further if the Supreme Court disagrees with its final ruling on the meaning of *pro rata* as applied to this case. When and if the court is faced with identifying additional expenses, the class will need to identify the specific portions of the budgetary analysis with which it takes issue.

The State's Motion for Summary Judgment is GRANTED. The Plaintiff class Motion for Summary Judgment is DENIED.

DATED at Anchorage, Alaska, this 25th day of July, 1994.

/s/ Peter A. Michalski

PETER A. MICHALSKJ
SUPERIOR COURT JUDGE

798 P.2d 1269

**Supreme Court of Alaska.**

**Donald H. CARLSON, Warren Hart, Gerald Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Appellants,**

**v.**

**STATE of Alaska, Commercial Fisheries Entry Commission, Appellee.**

**No. S-3290.**

Oct. 5, 1990.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

## OPINION

COMPTON, Justice.

This is a class action challenging Alaska's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits. The class, consisting of "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the State for commercial or gear licenses or permits," alleges violations of two federal constitutional provisions: the Privileges and Immunities Clause,[1] and the

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[1] The Privileges and Immunities Clause provides: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. art. IV, § 2, cl. 1.

Commerce Clause.[2] The class also challenges the charging of differential fees from June 22, 1978 until January 1, 1983 under former 20 Alaska Administrative Code (AAC) 05.220(a) as being without statutory authority. The class seeks declaratory and injunctive relief as well as a refund of excess payments under the current "unconstitutional" regime and the 1978-1982 "unconstitutional" and "unauthorized" regime. The superior court denied relief.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. STATUTORY HISTORY.

In 1949 the territorial legislature passed a law imposing a $50 commercial fishing license fee on nonresident fishermen and a $5 fee on residents, a 10:1 ratio. Ch. 66, § 2, SLA 1949. The law was struck down as violative of the Privileges and Immunities Clause of the Federal Constitution. *Mullaney v. Anderson,* 342 U.S. 415 (1952).

Beginning with statehood in 1959, the state charged differential licensing fees to resident and nonresident commercial fishermen pursuant to statute. Nonresident fishermen using most types of gear were charged three times the resident fee. *See* former AS 16.05.550, AS 16.05.570-.640; Ch. 94, art. III, § 8, SLA 1959. Exceptions to this rule existed for setnet or long line gear under former AS 16.05.560 (2:1 ratio) and for commercial operators of a single small boat under former AS 16.05.650 (no distinction).

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[2] The Commerce Clause provides: The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8, cl. 3.

The Limited Entry Act became effective April 27, 1973. Ch. 79, SLA 1973, *codified in* Alaska Statutes, Title 16, Article 43.

Alaska Statute 16.43.010(a) described the purpose of the Limited Entry Act as follows:

> It is the purpose of this chapter to promote the conserva-tion and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and control-ling entry into the commercial fisheries in the public interest and without unjust discrimination.

Alaska Statute 16.43.100(a) (6) provided that the Commercial Fisheries Entry Commission (CFEC) "shall . . . establish qualifications for the issuance of entry permits. . . ." AS 16.43.100(b) provided that the CFEC "may do all things necessary to the exercise of its powers under this chapter, whether or not specifically designated in this chapter." AS 16.43.110 provided that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter."

Alaska Statute 16.43.160 was first enacted in 1973. Ch. 79, SLA 1973. Former AS 16.43.160 provided in part:

> (a) The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits to reflect the cost of administering this chapter. Fees collected under this section shall be paid into the general fund.
> (b) Annual fees established under this section shall be no less than $10 and no more than $100 and shall reasonably reflect the different rates of economic return for different fisheries.

Between 1973 and 1978, commercial fishermen were thus required to pay for both a gear license and a limited entry permit. While gear license fees for nonresident commercial fishermen

were thrice, in most instances, what they were for residents initially, entry permit fees did not distinguish between residents and nonresidents. *See* former 20 AAC 05.220 (1974).

During the 1977 legislative session, the legislature revised the commercial fishing licensing scheme. Ch. 105, SLA 1977. Gear licenses were abolished altogether. Ch. 105, § 19, SLA 1977. Alaska Statute 16.43.160(a) was amended by removing the phrase "to reflect the cost of administering this chapter." Thus, AS 16.43.160(a) then read in part: "The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits." Additionally, AS 16.43.160(b) was amended to increase the maximum amount the CFEC could charge for a license from $100 to $750. Ch. 105, § 15, SLA 1977. These changes became effective January 1, 1978. Ch. 105, § 20, SLA 1977.

On the effective date of these changes, the CFEC could no longer charge differential gear license fees, or for that matter any gear license fees. On this same date, the CFEC amended 20 AAC 05.220 to provide for a 3:1 nonresident fee differential for entry permits. *See* Ch. 105, § 20, SLA 1977; former 20 AAC 05.220.

It was the view of then Attorney General Avrum Gross, as demonstrated by a letter from him to then Governor Jay Hammond, that "the fees now collected for [gear] licenses would be incorporated administratively by the [CFEC] into the fee for a permit as would the 3-1 nonresident-resident fee differential." Moreover, the increase in the maximum chargeable entry fee (from $100 to $750) was believed by Attorney General Gross, as shown by another letter to Governor Hammond, to "allow entry permit fees to incorporate the license fees which would be eliminated." The letters also show that he anticipated the enactment of regulations to accomplish this incorporation.

In 1981, an informal opinion of the attorney general was issued concerning whether the 3:1 fee ratio of 20 AAC 05.240(a) was authorized by statute, following a request by the chairman of the CFEC. 1981 Informal Op. Att'y Gen. 984. Without citing any directly supportive authority, the author concluded the differential was not authorized. *Id.* The regulations attorney for the CFEC disagreed with this assessment.

In 1982, the legislature again amended AS 16.43.160(b). This section now reads:

> (b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

The 1982 amendment thereby gave more certain authority to the CFEC to charge a 3:1 fee differential. This amendment was effective January 1, 1983. Ch. 79, § 3, SLA 1982.

## B. HISTORY OF STATE EXPENDITURES AND REVENUES.

The record contains a lengthy and detailed analysis of the revenues and expenditures connected with fisheries management for fiscal years 1978-1984.

The state contended below that the 3:1 fee ratio partially reimburses the state for that portion of the costs of fisheries management, enforcement and conservation attributable to nonresidents. The state, in essence, argued that it is subsidizing all commercial fishermen by not charging any of them (resident or not) his share of the costs of fisheries management.

The state's analysis identified four sources as the aggregate cost of fisheries management. First, the state included the annual operating budget of the CFEC itself (cost of issuing licenses and

permits, etc.). These amounts are evidenced by state budget reports for each year in question.

Second, the state included 40.6% of the annual operating budget of the Department of Public Safety (DOPS), representing the amount spent by state law enforcement agencies in support of commercial fisheries enforcement. The amount of the DOPS operating budget is also evidenced by state budget summaries for each year.

Third, the state included the annual operating budget of the Division of Commercial Fisheries, a division of the Department of Fish and Game. This division determines "how many fish are available each year for commercial harvesting." These expenditures are also voluminously documented by budget reports. Not counted as expenditures were "[a]dministration and [s]upport costs."

The state also included the annual operating budget of the Fisheries Rehabilitation Enhancement and Development (FRED) Division of the Department of Fish and Game. FRED

> rehabilitates and enhances fisheries by determining where and when fish are needed or wanted to be, and then producing the fish at that time and place. This is done by conducting extensive research studies and then working on the variety of projects that will implement the plans decided upon, which include establishing and running fish hatcheries, fertilizing lakes, planting fish, and cleaning up streams used by androgenous fish.

FRED's expenditures are also documented by budget breakdowns for each year. Not counted in FRED's expenditures were "[a]dministration and [s]upport costs" and sport fishing expenditures.

The state then attributed to nonresidents a percentage of these costs equal to the percentage of entry permits held by nonresidents in each year.[3]

Finally, the state presented evidence of revenues collected in connection with commercial fishing. The state included two sources: commercial entry permit fees and commercial fishing license fees. These numbers are again documented by budget reports.

The state then compared the percentage of expenditures attributable to nonresidents with the percentage of revenues taken in from nonresidents. In each year nonresident revenues from the sources counted falls considerably short of nonresident expenditures. *See* Appendix.

The class does not seriously dispute the factual accuracy of the foregoing figures. The amounts cited by both litigants as to expenditures suffer from only minor, immaterial discrepancies. Rather, the class disputed the inclusion of certain costs and the exclusion of certain revenues in the analysis. First, the class contended that the proper framework for examining whether nonresidents were contributing their share to fisheries management would be to contrast CFEC revenues with only CFEC expenditures, i.e. "expenses directly traceable to the costs of issuing permits and licenses." Including only these expenditures, the 3:1 fee ratio scheme results in a net profit to the state.

Alternatively, the class contended that if inclusion of all fisheries management expenditures in the analysis was appropriate, then "all sources of revenue [to the state]

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[3] The evidence of record shows that this percentage of costs actually favors nonresidents, who catch more fish per capita and hence derive more benefit from maintenance expenditures.

attributable to [nonresident] commercial fishermen" should also be included. The class urged the inclusion of "revenues derived indirectly from commercial fishermen from tax shifting by the fish processing industry, federal funds, marine fuel taxes, corporate and individual income taxes, and other sources of revenue derived from commercial fishermen." Including these indirect revenues, only in fiscal years 1983 and 1984 did expenditures exceed revenues.

## C. PROCEDURAL BACKGROUND.

On its first motion for summary judgment, the state prevailed on some issues, with the court finding material questions of fact remaining on others. On the Privileges and Immunities issue, the superior court held, relying on *Toomer v. Witsell,* 334 U.S. 385, *reh'g denied,* 335 U.S. 837 (1948), that while the issuance of licenses to fish commercially was sufficiently important to implicate the Privileges and Immunities Clause, the state had demonstrated a "permissible" reason for the discrimination. This reason was "to have the non-resident[s] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of this state, which costs are largely borne by the residents through general fund expenditures." The superior court decided that an analysis of whether this purpose was being met by the 3:1 fee ratio required comparison of all revenues collected directly from commercial fishers, with all the expenditures by the State on maintaining, conserving, or managing the fishery. It rejected the class' two proposed methods of determining fair share contribution: 1) comparing CFEC revenues with CFEC expenditures and 2) comparing all revenues from all sources (including corporate taxes, business license taxes, fuel taxes, etc.) garnered from nonresident commercial fishers with all expenditures to maintain fisheries.

The superior court found that the state had presented evidence "of the operating budgets of the four entities of the State which

are concerned with enforcement, operation, management, and conservation of the fisheries. The State's evidence indicates further that the operating budgets of these entities exceeded, in the years 1979 through 1984, the amount they collected in resident and non-resident licensing. . . ." Nevertheless, the superior court also found that there was a material question of fact as to whether the operating budgets truly reflected the costs of fisheries management.

As to the Commerce Clause challenge, the court held that commercial fishing in this state is within the reach of the Clause. It also held that the fee differential discriminated against interstate commerce on its face. However, the court reasoned that the same "legitimate local purpose" (ensuring that nonresidents pay their fair share of management costs) justified the discrimination, assuming the fee differential bore a substantial relationship to the purpose. Again, the court found the same question of material fact: whether the state's figures truly reflected the costs of management. The court also held that there is no less restrictive way to ensure that nonresidents pay their fair share of the costs of fisheries management than to collect the money from them as a fee.

The superior court further held that the CFEC had implied authority to enact 20 AAC 05.220(a) and charge a 3:1 fee differential before 1983. The court offered several factors supporting its conclusion. First, it noted that the 3:1 entry fees were enacted concurrent with the abolition of 3:1 gear license fees. The court reasoned that the 1977 amendments, as reflected by the attorney general's letters, were intended to substitute differential entry permit fees for differential gear fees. The court also noted that the Limited Entry Act did not forbid fee ratios. The court added that AS 16.43.160(a) did not merely authorize the issuance of licenses, but instead directed the CFEC to "establish annual fees for the issuance and annual renewal of entry

permits or interim use permits." Finally, the court reasoned that the deletion of the requirement that permit fees "reflect the cost of administering this chapter" from AS 16.43.160(a), along with the increase in maximum chargeable license fees, were indicative of intent to allow the CFEC to recoup to the General Fund whatever monies were expended for the management of fisheries.

Finally, the superior court held that even should the class eventually prevail, its members would not be entitled to a refund of fees extracted under an unconstitutional or unauthorized statute.

Later, the superior court reconsidered its decision that there were questions of material fact concerning whether the figures submitted by the state sufficed. Based on the state's more expansive documentation of costs and expenditures (discussed in section I B, *supra* ), the court held that no question of material fact remained regarding the accuracy of the state's calculations.

The class appeals.

## II. DISCUSSION

### A. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED AS TO THE CLASS' PRIVILEGES AND IMMUNITIES AND COMMERCE CLAUSE CHALLENGES.

The Privileges and Immunities Clause of article IV, section 2 of the United States Constitution provides: "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. . . . In line with this underlying purpose, it was long ago

> decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

*Toomer v. Witsell,* 334 U.S. 385, 395-96, *reh'g denied,* 335 U.S. 837 (1948) (footnote omitted).

Less favorable treatment by the state towards nonresidents runs afoul of the Privileges and Immunities Clause if: 1) the activity in question is "'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the [clause]," *and* 2) "[it] is not closely related to the advancement of a substantial state interest." *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 64-65 (1988) (citations omitted). *See also Toomer,* 334 U.S. at 396; *Robison v. Francis,* 713 P.2d 259, 263-64 (Alaska 1986). In determining whether the discrimination bears a close relationship to the permissible purpose, the availability of less restrictive means is relevant. *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 284 (1985); *Robison,* 713 P.2d at 264.

Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are *prima facie* a violation of it. *See Toomer,* 334 U.S. at 397; *Mullaney v. Anderson,* 342 U.S. 415, 417-18 (1952). *Compare Baldwin v. Fish & Game Comm'n of Montana,* 436 U.S. 371, 388 (1978) (sport or recreational hunting not protected by Privileges and Immunities Clause). Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal. The class argues both that there is no "substantial reason" for the discrimination, and that even if there is, the fee differential is not "closely related" to furthering the purpose.

In *Toomer,* South Carolina sought to justify a 100:1 ratio by arguing that its "conservation program for [fisheries] requires expenditure of funds beyond those collected in license fees–funds to which residents and not non-residents contribute." *Toomer,* 334 U.S. at 398. The Court held that it was permissible "*to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.*" *Id.* at 399 (emphasis added). However, the Court also held that South Carolina had not established a relationship between the justification and the differential fee. "Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, *or that any substantial amount of the State's general funds is devoted to [fisheries] conservation.*" *Id.* at 398 (emphasis added).

*Mullaney* dealt with Alaska's territorial predecessor to the differential fee scheme at issue here. The territorial scheme imposed a $5 license fee on resident commercial fishermen, and a $50 fee on nonresidents, a 10:1 ratio. Ch. 66, § 2, SLA 1949; *see also Mullaney,* 342 U.S. at 416. In *Mullaney,* Alaska, as did South Carolina in *Toomer,* asserted that the discriminatory fee was justified by a substantial reason; to wit, "the higher cost of enforcing the license law against nonresident fishermen." *Id.* at 417-18.

The *Mullaney* Court reiterated its suggestion in *Toomer* that this would be a sufficient reason to impose a discriminatory fee, but again held that there was "nothing to indicate that [the fee differential] 'would merely compensate' for the added enforcement burden." *Id.* at 418. According to the *Mullaney* Court, "[c]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations. But something

more is required than a bald assertion to establish a reasonable relation between the higher fees and the higher cost to [Alaska]." *Id.*

Subsequent to *Mullaney,* non-fisheries cases have resounded the "more than a bald assertion" theme. In *Austin v. New Hampshire,* 420 U.S. 656 (1975) the Court found

> no support in the record for the assertion of the court below that the [tax] creates no more than a "practical equality" between residents and nonresidents when the taxes paid only by residents are taken into account. "[S]omething more is required than bald assertion–by the state court or by counsel here–to establish the validity of a taxing statute that on its face discriminates against nonresidents."

*Id.* at 666 n.10 (citation omitted).

In *Hicklin v. Orbeck,* 437 U.S. 518 (1978), Alaska's local hire law failed Privileges and Immunities scrutiny for this same reason.

> [A]lthough the statute may not violate the [Privileges and Immunities] Clause if the State shows "something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed," . . . and, beyond this, the State "has no burden to prove that its laws are not violative of the . . . Clause," . . . certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents–especially the unemployed Eskimo and Indian residents–were unable to secure employment either because of their lack of education and job training or because of their

> geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.

*Id.* at 526-27 (citations and footnote omitted).

How much record support is needed under these cases to demonstrate a sufficiently "close connection" to a legitimate state purpose remains unclear. One court has noted:

> [T]here is a certain ambiguity in the Supreme Court cases concerning the burden of going forward with the evidence and the burden of persuasion of the challenger and the state. . . . Justice Brennan dissenting in *Baldwin* discussed the burdens on the challenger and the state in a privileges and immunities case as follows: "Although a State has no burden to prove that its laws are not violative of the Privileges and Immunities Clause, its mere assertion that the discrimination practiced against nonresidents is justified by the peculiar problem nonresidents present will not prevail in the face of a prima facie showing that the discrimination is not supportable on the asserted ground."

Justice Brennan, writing for the Court in *Hicklin,* discussed the burdens in a privileges and immunities case in the following language: "For although the statute may not violate the Clause if the State shows 'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed,' and, beyond this, the State 'has no burden to prove that its laws are not violative of the . . . Clause,' certainly no showing was made on this record that non-residents were 'a peculiar source of the evil [the statute] was enacted to remedy. . . .'"

Professor Tribe comments on the burden of proof in a privileges and immunities case as follows: "The standard of

review employed in *Toomer* . . . characterized by a shift in the burden of proof to the discriminating state and by an insistence on a fairly precise fit between remedy and classification, is almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."

Another commentator . . . described the burden of proof rule established in *Hicklin* as follows: "[Justice Brennan in *Hicklin*] departed from the traditional allocation of the burden of proof in cases arising under the clause. Before *Hicklin,* the nonresident had the burden of disproving the validity of the justifications offered by the state. *Hicklin* places a duty on the state to demonstrate a relationship between the presence of nonresidents and the problem which the state purports to alleviate. The shift of the burden of proof in this first prong discards the presumption of constitutionality that a statute normally enjoys and is inconsistent with Justice Brennan's position in *Baldwin* that the state had this burden only after the nonresident had made a 'prima facie showing that the discrimination is not supportable on the asserted grounds.' While Justice Brennan offered no explanation for this shift, it is consistent with his concern for the individual's interest.

Although the United States Supreme Court cases are not clear, we conclude that the challengers of the statutes in the case at bar bear the burden of producing evidence demonstrating the discriminatory effect of the statute on non-residents. If a discriminatory effect is shown, the state has the burden of producing 'something to indicate that nonresidents constitute a peculiar source of evil at which the statute is aimed' . . . if the state makes such a showing, the challengers have the burden of showing the discrimination is "not supportable on the asserted grounds."

*Taylor v. Conta,* 106 Wis. 2d 321, 316 N.W.2d 814, 823 n.17 (1982) (citations omitted). *Contra, Silver v. Garcia,* 592 F. Supp. 495, 498 (D.P.R. 1984); *Glenovich v. Noerenberg,* 346

F. Supp. 1286, 1293 (D. Alaska), *aff'd*, 409 U.S. 1070 (1972) (state bears the burden of justification). We are persuaded by the Wisconsin Supreme Court's analysis, and agree with its conclusion that the burden of persuasion to demonstrate justification is properly placed on the state.

The analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated.[4] The Commerce Clause grants

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[4] Early cases suggested that the Commerce Clause does not come into play until the fish are actually harvested, *e.g.*, *McCready v. Virginia*, 94 U.S. 391, 396 (1876); *Toomer*, 334 U.S. at 394-95 (Commerce Clause not implicated by a nondiscriminatory tax where taxable event, the taking of shrimp, "occurs before the shrimp can be said to have entered the flow of interstate commerce."); *Alaska v. Arctic Maid*, 366 U.S. 199, 203 (1961) (actual taking of fish is a "local activity" outside the Commerce Clause, despite the fact that the fish are destined for interstate commerce). *See also Tangier Sound Watermen's Ass'n v. Douglas*, 541 F. Supp. 1287, 1301-06 (E.D.Va. 1982) (review of the cases); *State v. Reefer King Co., Inc.*, 559 P.2d 56, 64 (Alaska 1976), *modified on reh'g*, 562 P.2d 702 (Alaska 1977) (taxes distinguishing between floating and shorebased processors do not implicate Commerce Clause where statute excludes interstate movement of "floaters" from taxation).

Dictum in more recent cases, however, suggests the contrary.

> [While] at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce. The movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce.

*Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281-82 (1977) (citations and footnote omitted).

*Hicklin* also suggests that the Commerce Clause applies to this case. "[T]he Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, *but*

Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Maine v. Taylor*, 477 U.S. 131 (1986) (*quoting Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980)). "[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138, *quoting Hughes*, 441 U.S. at 336.[5]

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*destined for interstate commerce*." *Hicklin*, 437 U.S. at 533 (emphasis added).

The Court has also held that state laws which ban the export from the state of fish taken instate, and state laws which ban the import of fish taken out of state, at least implicate the Commerce Clause. *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (export, struck down); *Maine v. Taylor*, 477 U.S. 131 (1986) (import, upheld). Despite its broad dictum in *Douglas*, the court in *Hughes* quoted with approval from Justice Field's dissent in *Geer v. Connecticut*, 161 U.S. 519, 538 (1896) (Field, J., dissenting): "[w]hen any animal . . . is lawfully killed for purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Hughes*, 441 U.S. at 329.

[5] *Taylor* seems to squarely put the burden of justification on the state, whereas Privileges and Immunities Clause cases (as discussed *supra*) have been inconsistent on this issue. It would be anomalous, however, to conclude that a law facially discriminating against interstate commerce could pass muster under the Privileges and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation. *Baldwin*, 436 U.S. at 379.

The superior court, in granting summary judgment in favor of the state, adopted the reasoning of *Salorio v. Glaser,* 82 N.J. 482, 414 A.2d 943, *cert. denied,* 449 U.S. 874, *app. dism.,* 449 U.S. 804 (1980). In *Salorio,* New Jersey sought to impose an "Emergency Transportation Tax" (ETT) on nonresidents who used the state highway system. *Salorio,* 414 A.2d at 945. The *Salorio* court interpreted *Toomer* and *Mullaney* to permit a state to "impose upon nonresidents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state." *Salorio,* 414 A.2d at 953. "[T]he State may exact from [nonresidents] a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause." *Id.* 414 A.2d at 954.

We believe that the superior court erred in adopting *Salorio.* In our view, its focus is misplaced. Implicit in *Salorio* is the notion that it is permissible to require nonresidents to pay up to 100% of their *pro rata* share of expenditures regardless of what percentage of their *pro rata* share residents are in fact paying. In other words, *Salorio,* as applied to this case, seems to add up to a general proposition that the state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment. Such a principle seems economically indistinguishable from imposing a facially equal tax on residents and nonresidents while making it effectively unequal by a system of credits and exemptions. Such schemes have been struck down by the United States Supreme Court. *Austin, supra; Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60 (1920). *See also Williams v. Zobel,* 619 P.2d 422, 429-30 & 436-37 (Alaska 1980) (Rabinowitz, C.J., concurring).

The proper focus in our view is on whether residents and similarly situated nonresidents are being treated with substantial equality. The appropriate inquiry is thus whether all fees and

taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

The language of *Toomer* to the effect that it would be permissible "to charge nonresidents a differential which would merely compensate the state . . . for any conservation expenditures from taxes which only residents pay" requires additional discussion. We read this statement to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out of which conservation expenditures were made, then differential fees would not be permissible. That, however, is not the case in Alaska where a very high proportion of total state revenues are derived from petroleum production. For example, in fiscal year 1986, 86 percent of state revenues were so derived. *Trustees for Alaska v. State,* 795 P.2d 805-10 (Alaska 1990). Thus, in 1986, it would be correct to say that eighty-six cents of each dollar spent for conservation came from state revenue sources to which nonresident fishermen made no contribution. These revenues could have been used to benefit residents through various other programs and they are, analytically, equivalent to "taxes which only residents pay."

The point of *Toomer,* thus, is that the state may equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference. On this record we are unable to determine whether the higher fees charged nonresidents are excessive for this purpose. Thus, we are unable to say whether there is "a fairly precise fit between remedy and

classification." *Taylor v. Conta,* 316 N.W.2d at 823 n.17. The burden is on the state to make this showing.

We reverse the superior court's determination of this issue and remand for further proceedings consistent with this opinion.

**B. THE 3:1 FEE DIFFERENTIAL WAS AUTHORIZED BY STATUTE PRIOR TO THE EFFECTIVE DATE OF THE 1982 AMENDMENTS TO AS 16.43.160(b) (1/1/83).**

We now address the class' contention that the 3:1 fee ratio was not authorized by statute prior to 1983. Alaska Statute 16.43.110(a), beginning in 1973 and continuing to the present day, provides that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter." Ch. 79, § 1, SLA 1973. Former AS 16.43.160(a) mandated that "[t]he [CFEC] *shall* establish annual fees for the issuance and annual renewal of entry permits or interim use permits." (Emphasis added). The language limiting the CFEC's fees to "reflect the cost of administering this chapter" was removed by the 1977 amendments, along with an increase in the maximum fee from $100 to $750 and abolishment of gear licenses. Ch. 105, § 15, SLA 1977.

The analysis of this issue is governed by *Johns v. Commercial Fisheries Entry Commission,* 758 P.2d 1256 (Alaska 1988). Examining the validity of CFEC regulations is a three step process: we determine "'whether the legislature delegated rule-making authority to the [CFEC], whether the [CFEC] followed the Administrative Procedure Act in promulgating this regulation, and whether the regulation is consistent with and reasonably necessary to implement the statutes authorizing its adoption.'" *Johns,* 758 P.2d at 1260, *quoting Chevron USA Inc. v. LeResche,* 663 P.2d 923, 927

(Alaska 1983). No one contends that the differential fee structure was not promulgated in accordance with the APA.

This court recognized in *Johns* that AS 16.43.110(a) is a broad delegation of power to the CFEC to adopt regulations "necessary or proper" to implement the purposes of the Act. *Johns,* 758 P.2d at 1256; *see also Kalmakoff v. State, Commercial Fisheries Entry Comm'n,* 693 P.2d 844, 853 (Alaska 1985). The purpose of the Limited Entry Act is "to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination." AS 16.43.010(a). Thus, if the 3:1 ratio regulation was a necessary or proper implementation of these purposes, it was authorized.

We conclude that this regulation was a proper implemen-tation of the purposes of the Act. Conservation and sustained yield management are not free. What evidence of legislative intent there is from the 1977 amendments to the Act shows that Limited Entry Act fees were intended to substitute for the previous differential gear license fees as the means of ensuring nonresident contribution toward the cost. The maximum amount chargeable was raised from $100 to $750. Ch. 105, § 15, SLA 1977. The clause seemingly limiting the level of fee collection to CFEC expenditures alone was abolished. Ch. 105, § 15, SLA 1977. The executive branch also apparently believed that was the purpose of the amendment. We therefore reject the class' contention.[6]

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[6] The class appears to argue that AS 16.43.160(a) is a dedication of state taxes or licenses to a special purpose in contravention of Article IX, § 7 and an improper delegation of taxing power under Article X, § 2 of the Alaska Constitution.

## C. IS THE CLASS ENTITLED TO A REFUND SHOULD THEY PREVAIL ON REMAND?

The class also appeals the superior court's ruling that its members would not be entitled to a refund should they prevail on their constitutional claims. Since we are remanding the superior court's determination of the constitutional issues, we will address the issue of refund availability.

Alaska Statute 43.15.010(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax, or (2) in the absence of a judgment, it is obvious to the Department of Revenue that the taxpayer would obtain judgment if legal proceedings were prosecuted by the taxpayer.

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The "special dedication" argument is frivolous. On the face of AS 16.43.160(a), all funds collected from license fees are paid directly into the general fund. *Compare State v. Alex*, 646 P.2d 203, 207-11 (1982) ("earmarked" funds).

The Article X, § 2 argument is equally meritless. The class argues that if we construe AS 16.43.160(a) to authorize the collection of fees by the CFEC in an amount greater than is necessary to fund the CFEC's issuance of licenses, this would give rise to an unconstitutional delegation of taxing power. Article X, § 2 simply has nothing to do with this case. It provides that "[a]ll local government powers shall be vested in cities and boroughs The State may delegate taxing powers to organized cities and boroughs only." This is a limitation intended to simplify the structure of local government; nothing in this suggests any limitation on the state's ability to create a *state* agency and authorize it to set license levels. *Compare Alex*, 646 P.2d at 211-13.

We recently considered the scope and effect of this statute in *Principal Mutual Life Ins. Co. v. State, Division of Insurance,* 780 P.2d 1023 (Alaska 1989). Although we declined to definitively resolve the question of whether AS 43.15.010(a) foreclosed a common law action in assumpsit for taxes wrongfully assessed and paid, we clearly held that both under the statute and common law, the taxpayer must formally "protest the payment of the tax at the time of payment in order to subsequently maintain" either a common law or statutory cause of action. *Principal Mutual,* 780 P.2d at 1028-30.

In *Pacific American Fisheries, Inc. v. Mullaney,* 13 Alaska 729, 105 F. Supp. 907, 909 (1952), the district court considered whether the excess fishing license fees collected under Alaska's previous 10:1 fee scheme, struck down in *Mullaney v. Anderson,* could be refunded under § 48-7-1, ACLA 1949, recodified into the current tax refund statute as AS 43.15.010. *See Principal Mutual,* 780 P.2d at 1028 n.17. The district court held that the differential gear license fee was a tax within the meaning of the refund statute. *Pacific American Fisheries,* 105 F. Supp. at 908-09. The holding of *Pacific American Fisheries* finds continued support in the title of AS 43.15, "Refunds of Taxes and Licenses." *See also* AS 43.15.010(c) (providing for the refund of "license taxes" where a licensee is "prevented from using the license by court order. . . .") Thus, in the abstract, the class might avail itself of this statute to recover any unconstitutionally extracted fees.

However, the class seems to concede in its brief that the necessary protests were not made, instead presenting argument that the requirement of a protest was waived. The protest requirement may be waived by the taxing authority. *Principal Mutual,* 780 P.2d at 1029. On remand, the court should conduct appropriate inquiry into this issue.

We also note that the superior court has been operating under the assumption that a six-year statute of limitations applies to the class' sought after refund. However, there is a specific statute of limitations applicable to claims for tax refunds. Alaska Statute 43.05.275 provides that:

> *a claim for* credit or *refund of a tax under this title for which a taxpayer is required to* file a return or *pay a tax may be filed by the taxpayer* (1) before the later of (A) three years from the time the return was filed; or (B) two years from the time the tax was paid; or (2) *within two years from the time the tax was paid, if no return was filed.*

(Emphasis added). On remand, assuming that the class overcomes the hurdle of failing to protest payment, it is limited by this two year statute of limitations.

## III. CONCLUSION

The judgment of the superior court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

# APPENDIX

## PERCENTAGE OF COSTS PAID BY NONRESIDENTS COMPARED TO PERCENTAGE ATTRIBUTABLE TO NONRESIDENTS

| Year | Total No. of Permits | Number of Permits Held by Non-Res. | % Held | Total Costs of Enforcement & Conservation (in Thous) | Fair Share of Non-Res. (Total Costs x %) (in Thous) | Amount Paid by Non-Res (in Thous) | % Paid |
|---|---|---|---|---|---|---|---|
| 1979 | 26,716 | 4,884 | 18% | 18,151.7 | 3,267.3 | 1,492.2 | 8.22% |
| 1980 | 29,432 | 5,548 | 19% | 17,901.2 | 3,401.2 | 1.240.4 | 6.93% |
| 1981 | 28,312 | 5,039 | 18% | 23,316.1 | 4,196.9 | 1,465.1 | 6.28% |
| 1982 | 29.021 | 5,181 | 18% | 28,986.5 | 5,217.6 | 1,397.8 | 4.82% |
| 1983 | 24,450 | 4,608 | 19% | 30,999.0 | 5,889.8 | 1,335.6 | 4.31% |
| 1984 | 29,322 | 4,718 | 16% | 34,023.2 | 5,443.7 | 1,381.3 | 4.06% |

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE**

| | | |
|---|---|---|
| DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, Individually) and as Class Representatives on Behalf of All Persons Similarly Situated, Plaintiffs, | ) | |
| vs. | ) | Case No. 3AN-84-5790 Civil |
| STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Defendant. | ) | |

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**FINAL ORDER**

For the reasons set forth at the oral argument held on the Plaintiff's Second Motion for Summary Judgment on February 3, 1989.

IT IS ORDERED that summary judgment is granted to Defendant State of Alaska on all remaining claims and issues.

DATED this 21st day of February 1989.

/s/ Karen L. Hunt
Karen L. Hunt
Superior Court Judge

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

### CONSTITUTIONAL PROVISIONS

Article I, § 8 of the United States Constitution provides in pertinent part:

> The Congress shall have Power To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Article IV, § 2 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

**ALASKA STATUTES**
**Title 16. Fish and Game.**
**Chapter 05. Fish and Game Code.**
**Article 4. Licensing of Commercial Fishing Crewmembers and Vessels.**

Current Through 2002

**Sec. 16.05.480 Commercial fishing license; disclosure for child support purposes.**

(a) A person engaged in commercial fishing shall obtain a commercial fishing license and shall retain the license in possession and readily available for inspection during fishing operations. An entry permit or interim-use permit entitles the holder to participate as a gear operator in the fishery for which the permit is issued and to participate as a crewmember in any fishery. A crewmember fishing license is not transferable and entitles the holder to participate as a crewmember in any fishery.

(b) A person applying for a resident commercial license under this section shall provide the person's social security number and the proof of residence that the department requires by regulation.

(c) [Repealed, § 12 ch 123 SLA 1978.]

(d) Upon request, the department shall provide a social security number provided under (a) of this section to the child support enforcement agency created in AS 25.27.010, or the child support agency of another state, for child support purposes authorized under law.

(e) Except as provided under AS 16.05.470 and AS 23.35.060, fees collected from the sale of crewmember fishing licenses under this section may be appropriated into the fish and game fund.

(f) [Repealed, § 7 ch 27 SLA 2001.]

(g) For a crewmember fishing license issued for calendar year 2002 and following years, a resident engaged in commercial fishing who is 11 years of age or older and who does not hold an entry permit or an interim-use permit shall pay an annual fee of $60. For a crewmember fishing license issued for calendar year 2002 and following years, a resident engaged in commercial fishing who is less than 11 years of age and who does not hold an entry permit or an interim-use permit shall pay an annual fee of $5.

(h) For a crewmember fishing license issued for calendar year 2002 and following years, a nonresident engaged in commercial fishing who is 11 years of age or older and who does not hold an entry permit or an interim-use permit shall pay an annual base fee of $60 plus an amount, established by the department by regulation, that is as close as is practicable to the maximum allowed by law. For a crewmember fishing license issued for calendar year 2002 and following years, a nonresident engaged in commercial fishing who is less than 11 years of age and who does not hold an entry permit or an interim-use permit shall pay an annual base fee of $5 plus an amount, established by the department by regulation, that is as close as is practicable to the maximum allowed by law.

(i) In this section, "commercial fishing license" includes an entry permit and an interim-use permit issued under AS 16.43 and a crewmember fishing license.

**Title 16: Fish and Game – Pre – 2001**

**Sec. 16.05.480. Commercial fishing license.** (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents. Except for those which are also entry or interim-use permits, all commercial fishing licenses are nontransferable. The commercial fishing license shall be retained in the possession of the licensee, readily accessible for inspection at all times. No more than one fee may be charged annually against a person. For the purposes of this section, "commercial fishing license" includes entry permits and interim-use permits issued under AS 16.43 and crewmember fishing licenses.

(b) A person applying for a resident commercial license under this section shall provide the proof of residence that the department requires by regulation.

(c) *[Repealed § 12 ch 123 SLA 1978.]* (§ 6 art III ch 94 SLA 1959; am § 19 ch 131 SLA 1960; am § 1 ch 93 SLA 1966; am § 2 ch 42 SLA 1968; am § 8 ch 105 SLA 1977; am §§ 1, 2, 12 ch 123 SLA 1978; am § 1 ch 79 SLA 1982)

AK ST S 16.43.160

**ALASKA STATUTES**
**Title 16. Fish and Game.**
**Chapter 43. Regulation of Entry into Alaska Commercial Fisheries.**
**Article 2. Entry Permit System.**

**Sec. 16.43.160 Fees.**

(a) The commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits.

(b) [Repealed, § 7 ch 27 SLA 2001.]

(c) [Repealed, § 7 ch 27 SLA 2001.]

(d) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue.

(e) For an entry permit or an interim-use permit issued for calendar year 2002 and following years, the annual base fee may not be less than $10 or more than $300. The annual base fee must reasonably reflect the different rates of economic return for different fisheries. The fee for a nonresident entry permit or a nonresident interim-use permit shall be higher than the annual base fee by an amount, established by the commission by regulation, that is as close as is practicable to the maximum allowed by law. The amount of the fee for a nonresident entry permit or a nonresident interim-use permit may reflect

(1) the costs incurred by the state that are directly attributable to participation of nonresidents in the commer-cial fisheries of the state;

(2) the costs incurred by the state for

(A) direct operating expenditures for ongoing manage-ment, support, and regulation of the commercial fishing industry, including relevant expenditures of the

(i) Office of the Governor Alaska Coastal Management Program;

(ii) Department of Environmental Conservation--air and water quality permitting activities and seafood inspection activities;

(iii) Department of Community and Economic Develop-ment--commercial fishing loan program, Alaska Seafood Marketing Institute, and community development quota program;

(iv) Department of Fish and Game--division of commer-cial fisheries, division of habitat and restoration, board support section, division of administrative services, division of sport fish, commissioners office, and Alaska Commercial Fisheries Entry Commission;

(v) Department of Labor and Workforce Development--wage and hour enforcement, mechanical inspections, occupa-tional safety and health activities, and fishermens fund;

(vi) Department of Law;

(vii) Department of Natural Resources, including the Alaska coastal management program;

(viii) Department of Public Safety--commercial fisheries enforcement;

(ix) Department of Revenue--fisheries business tax pro-gram, fishery resource landing tax program, salmon enhance-ment tax program, salmon marketing tax program, and dive fishery management assessment program;

(x) University of Alaska--Fisheries Industrial Technology Center, Institute of Marine Science, Marine Advisory Pro-gram,

Sea Grant College Program, and School of Fisheries and Ocean Sciences;

(xi) Legislature;

(xii) Alaska Court System;

(B) indirect operating expenditures for general overhead attributable to supporting the commercial fishing industry, including expenditures for general overhead attributable to components of agencies that have direct operating expenditures identified under (A) of this paragraph and to components of agencies for which direct operating expenditures related to the ongoing management, support, and regulation of the commercial fishing industry cannot be readily determined;

(C) general government expenditures for government services that are used by a portion of the population attributable to the presence of the commercial fishing industry, including government services provided by the Department of Administration, Department of Corrections, Department of Education and Early Development, Department of Health and Social Services, Department of Military and Veterans' Affairs, and Department of Transpor-tation and Public Facilities;

(D) capital expenditures to support the commercial fishing industry as measured by annual depreciation of public facilities and infrastructure; and

(E) expenditures to subsidize the construction and opera-tion of salmon hatcheries; and

(3) the amount of revenue foregone by the state due to the current management system for commercial fisheries in the state.

(f) For an entry permit or an interim-use permit issued for calendar year 2002 and following years, the holder of a permit whose household income, assets, and financial resources fall

within the eligibility standards for the food stamp program under 7 U.S.C. 2011–2025, as amended, is subject to a maximum annual fee that is equal to 50 percent of the fee that the permit holder would otherwise pay under (e) of this section.

**Pre-2001**

**Sec. 16.43.160. Fees.** (a) The commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits. The amount paid by a permit holder under the provisions of AS 16.05.480 shall be credited by the commission toward payment of the fee charged under this section. No more than one credit may be obtained annually by a person.

(b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of econmic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

(c) The resident holder of any entry permit or interim-use permit who has a family income falling within the federal proverty guidelines, adjusted by the commission to reflect appropriate cost-of-living differentials, is subject to a maximum annual fee of $15.

(d) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue. (§ 1 ch 79 SLA 1973; am § 15 ch 105 SLA 1977; am § 4 ch 123 SLA 1978; am § 2 ch 79 SLA 1982; am §§ 3, 4 ch 22 SLA 1985)

# ALASKA ADMINISTRATIVE CODE
# TITLE 20. MISCELLANEOUS BOARDS AND COMMISSIONS
# CHAPTER 5. COMMERICAIL FISHERIES ENTRY COMMISSION
# ARTICLE 2. FISHERY IDENTIFICATIONS SYSTEM, ADMINISTRATIVE AREAS AND ANNUAL FEES

Current through Register 165 (April 2003)

## 20 AAC 05.240. Schedule of annual fees for 2001.

Repealed 12/21/2002, Register 164.

**20 AAC 05.240. Schedule of annual fees.** (2001) (a) The annual fee for the issuance or renewal of an entry permit or interim-use permit is determined by the commission on a yearly basis according to the following:

(1) The resident annual fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is .25 percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection. The non-resident annual fee is three times this amount, as set out in (4) of this subsection. If insufficient data are available to determine the estimated value of an entry permit, the annual fee in a limited fishery will be calculated according to (2) or (3) of the subsection.

(2) The resident annual fee for the issuance or renewal of an interim-use permit in an unlimited fishery is .25 percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection. The non-resident fee is three times this amount, as set out in (4) of this subsection.

(3) Notwithstanding (2) of this subsection, the commission will, in its discretion, make an appropriate adjustment to a fee if more than one permit type allows the directed harvest of the same species with the same gear in the same area. If strict application of (1) and (2) of this subsection results in a fee that exceeds the level appropriate in light of the rate of economic return for the fisheries covered by that permit, the commission will, in its discretion, reduce the fee.

(4) The resident and non-resident annual fees are:

| FEE CLASS | ANNUAL FEE | |
|---|---|---|
| | Resident | Non-Resident |
| I | $ 250 | $ 750 |
| II | 200 | 600 |
| III | 150 | 450 |
| IV | 100 | 300 |
| V | 50 | 150 |

(5) Under (1) of this subsection, the entry permit value for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies.

(6) Under (2) and (3) of this subsection, the average gross earnings for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies. These estimates will be based upon the most recent three years for which data are available. If less than three years of data are available for a fishery, the average will be calculated using the available years.

(b) Unless fishery resources, gear, or administrative areas are combined under this chapter, and except as provided in 20

AAC 05.120, a separate permit is required for each separate fishery resource, gear, and administrative area.

(c) For the purpose of assessing the fees for the application for, or renewal of, entry and interim-use permits, a "resident" is

(1) [repealed 11/26/87.]

(2) one who, on the date of the permit application or renewal, and throughout the 12-month period before the date

(A) except for brief intervals, military service, attendance at an educational or training institution, or absence for good cause is, and was, physically present in the state with the intent to remain in the state indefinitely and to make a home in the state; and

(B) neither claimed nor received benefits as a resident of another state, territory or country.

(d) For the purposes of this chapter, criteria relevant to a determination of residence include, but are not limited to

(1) where an individual is registered to vote;

(2) where an individual claims residence on his income tax returns;

(3) where an individual registers or licenses his personal property, including but not limited to cars, boats, trucks and trailers;

(4) by which the state the individual is licensed to drive;

(5) in which state the individual maintains bank accounts, savings accounts, lines of credit, and other such financial relationships; and

(6) in which state the individual maintains a permanent place of abode.

(e) Alaska residents may apply for a reduced fee of $15 for the issuance of an interim-use permit or the annual renewal of an interim-use or entry permit if their total family income falls within the poverty guidelines for the Legal Services Corporation, as set out in Appendix A to 45 Code of Federal Regulations Section 1611, and as modified by Alaska regional cost-of-living differentials. A commission publication entitled "CFEC Map/Cost of Living Differentials" contains maps designating the regions and charts showing regional cost-of-living differentials, and is incorporated in this section by reference. (EFF. 12/27/79, Register 72; am 1/2/81, Register 77; am 3/4/81, Registered 78; am 1/29/82, Register 81; am 10/30/82, Register 84; am 12/30/82, Register 84; am 10/28/84, Register 92; am 12/29/84, Register 92; am 4/13/85, Register 94; am 9/26/85, Register 95; am 11/22/87, Register 104; am 11/26/87, Register 104; am 1/17/91, Register 117)

Table 1: FY 96 Commercial Fishing Operating Budget Expenditures ($ thousands)

| Department<br>Component/BRU/Category | Total Funds<br>FY 96 |
|---|---|
| **Labor (DOL)** | |
| Fisherman's Fund | 477.3 |
| Wage & Hour | 77.8 |
| Mechanical Inspection | 63.8 |
| OSH | 55.9 |
| **DOL Total** | 674.8 |
| **Public Safety (DPS)** | |
| Fish and Wildlife Protection | 5,576.9 |
| State Troopers | 312.4 |
| Commissioner's Office | 33.8 |
| Administration Services | 90.9 |
| Laboratory Services | 6.6 |
| Information Systems | 48.6 |
| **DPS Total** | 6,069.1 |
| **Commerce (DCED)** | |
| Commissioner/Administration | 274.7 |
| Trade & Development | 147.0 |
| Measurement Standards | 190.2 |
| Investments | 2,322.1 |
| ASMI | 14825.1 |
| Fish Enhancement Tax | 5,516.0 |
| **DCED Total** | 23,275.1 |
| **Governor** | |
| Exec Operations, DGC & OMB | 372.1 |
| **Court System** | 296.2 |
| **Law** | |
| Civil | 965.4 |
| Criminal | 153.2 |
| Statehood Defense/Federal Relations | 583.8 |
| Environmental — Exxon Valdez | 145.9 |
| **Law Total** | 1,848.3 |

| Department<br>Component/BRU/Category | Total Funds<br>FY 96 |
|---|---|
| **Revenue (DOR)** | |
| Operations | 220.0 |
| Shared Fish Taxes | 22,153.1 |
| **DOR Total** | 22,373.1 |
| | |
| **Community & Regional Affairs (DCRA)** | |
| Community Development Quota Program | 230.2 |
| Shared Fish Taxes | 849.0 |
| **DCRA Total** | 1,079.2 |
| | |
| **Environmental Conservation (DEC)** | |
| Air and Water Quality | 1,244.2 |
| Environmental Health | 1,790.7 |
| **DEC Total** | 3,034.9 |
| | |
| **Legislature**** | |
| Legislature Total | 1,876.1 |
| | |
| **Natural Resources (DNR)** | |
| Forest, Lands & Water | 135.4 |
| | |
| **University of Alaska** | |
| Fisheries Research | 701.5 |
| Fisheries Industrial Technical Center | 423.1 |
| School of Fisheries and Ocean Sciences | 1,376.7 |
| Institute of Marine Science | 4,869.5 |
| Marine Advisory Program | 1,386.2 |
| Sea Grant Program | 439.4 |
| **University Total** | 9,196.4 |
| | |
| **Fish and Game (ADFG)** | |
| Commercial Fisheries | 37,715.1 |
| Sport Fish | 200.0 |
| Commissioner's Office | 657.2 |
| Administration | 3,656.6 |
| Boards of Fish and Game | 399.4 |
| Habitat | 10,613.8 |
| CFEC | 2,626.2 |
| **ADFG Total** | 55,888.3 |

| Department<br>Component/BRU/Category | Total Funds<br>FY 96 |
|---|---|
| **Operating Expenditure Calculations** | |
| **(1) Direct Operating Expenditures** | 126,099.1 |
| **(2) Indirect Operating Expenditures** | |
| Department of Labor | 66.2 |
| Department of Revenue | 26.8 |
| Governor's Office | 359.9 |
| Department of Community and Regional Affairs | 327.9 |
| Department of Environmental Conservation | 193.0 |
| Department of Natural Resources | 10.3 |
| University of Alaska | 37.6 |
| **Indirect Operating Expenditures:** | **1,021.7** |
| **(3) General Government Expenditures:** | |
| Department of Administration | 257,195.6 |
| Department of Correction | 138,823.0 |
| Department of Education | 893,830.3 |
| Department of Health and Social Services | 819,210.1 |
| Department of Military and Veteran's Affairs | 44,574.8 |
| Department of Transporation and Public Facilities | 333,508.2 |
| **Subtotal Overhead Expenditures** | **2,487,142.0** |
| **(4) General Government Expenditures @ 8.9% of Subtotal*** (3)*.087 = (4) | **221,355.6** |
| **(5) Grand Total FY 96 Operating Expenditures Associated With Commercial Fishing**<br>(1) + (2) + (4) = (5) | **348,476.4** |

Notes to Table:

*Based on ISER simulation of the proportion of the statewide population related to the commercial fishing industry.

*Prepared by OMB – BP.*

FILED
OCT 1 2 2003
OFFICE OF THE CLERK

No. 03-73

# In The Supreme Court of the United States

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, individually and as Class Representatives on behalf of all persons similarly situated,

*Petitioners,*

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Alaska**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Alaska Supreme Court's rulings below are interlocutory.

2. Whether the Alaska Supreme Court erred by not reviewing the state's commercial fishing fee differential, which is predicated on residency, under the Commerce Clause.

3. When a state imposes fees for a state-provided service, whether the compensatory tax doctrine prohibits the state from crediting residents with taxes they pay for that service.

## LIST OF PARTIES

Petitioner parties (class representatives):

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE

Respondent:

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF FACTS AND PROCEEDINGS

### 1. Alaska's Limited Entry Program

Alaska has a limited entry system for many of its commercial fisheries. Under that system, a person must acquire an entry permit to operate a commercial fishing vessel in certain fisheries. The number of permits available in each of those fisheries is limited.

There are several ways to acquire an entry permit in a limited fishery. A person may qualify for one when the state initially limits entry into the fishery, based on factors such as his past participation in the fishery and economic dependence on it. A person also may purchase a limited entry permit on the open market from a permit holder, the most common way of acquiring one. Market forces determine the purchase price, which is usually many thousands of dollars[1] and is paid to the seller, not to the state. A person also may acquire a limited entry permit as a gift or through inheritance. None of these methods favors Alaska residents.

### 2. Alaska's Annual Permit and Annual Crewmember License Fees

A person who has acquired an entry permit for a limited commercial fishery or a person who intends to

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[1] Current estimated prices of permits range from $2000 to $258,700 depending on the perceived earning potential of the fishery. Commercial Fisheries Entry Commission, *2003 Estimated Monthly Permit Value Report*, available at www.cfec.state.ak.us.

operate gear in a non-limited fishery must pay the state an annual permit fee. A person who intends to work as a crewmember in an Alaskan commercial fishery must pay the state an annual crewmember license fee.

The fees for annual permits are divided into five fee classes. The fee for each class is determined by the earning potential of fisheries in that class. Thus, permits for fisheries with higher earning potential have higher annual fees than permits for fisheries with lower earning potential.

Alaska charges nonresidents higher fees for permits and for annual crewmember licenses than it charges residents. Before 2002, the state charged a nonresident permit holder an annual fee that was three times the amount that it charged a resident for the same permit. During the period of the 1:3 ratio, the fee differential – the difference between the fee charged a resident and the fee charged a nonresident – ranged from $100 per year for fisheries having the lowest earning potential to $500 per year for fisheries having the highest earning potential.[2] During the same period, the ratio between the fee for a resident crewmember license and for a nonresident crewmember license was initially 1:3 and later about 1:2, for a difference of $60 or $65, respectively.

In 2001, the state replaced the ratio approach for setting the fee differential with a formula established by the Alaska Supreme Court. App. 61-64.

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[2] Former Alaska Statute 16.05.480(a); AS 16.43.160(a)(b); 20 AAC 05.240(a)(1), (4).

### 3. The Funding of Commercial Fisheries Management in Alaska

The Alaska Supreme Court's formula for setting the fee differential takes into account the way that Alaska funds commercial fisheries management. Each year, the state appropriates public money to fund the protection and enhancement of commercial fishery resources, fisheries law enforcement, and the allocation of fishery resources among various commercial users.

But because the annual permit and license fees paid by commercial fishers, described above, are insufficient to cover the state's commercial fisheries expenditures, the state supplements them with general funds. In Alaska, general funds are derived mostly from petroleum royalties, taxes, and other petroleum revenues that belong to the state's residents. In other words, through their petroleum revenues, Alaska residents pay a portion of the state's financial support of commercial fisheries – fisheries that benefit both resident and nonresident commercial fishers.

### 4. The Alaska Supreme Court's Formula for Setting the Resident-Nonresident Fee Differential

The Alaska Supreme Court's formula reflects the fact that nonresidents do not otherwise contribute to this portion of the state's commercial fisheries management. The formula enables the state to charge a nonresident commercial fisher an additional amount for annual permits and crewmember licenses that is comparable to the contribution of a resident commercial fisher through his share of the state's petroleum revenues spent for commercial fisheries management.

The formula is derived from this Court's decision in *Toomer v. Witsell*, 344 U.S. 385 (1948). In *Toomer*, the Court held that a state may "charge non-residents a differential which would merely compensate the State for any enforcement burden they may impose *or for any conservation expenditures from taxes which only residents pay*." *Toomer*, 344 U.S. at 399, emphasis added.

The formula results in a differential that is based on the latter rationale, one that compensates Alaska "for any conservation expenditures from taxes which only residents pay." *Id.* Because Alaskans pay no general income tax, and because most of the state's revenues come from petroleum taxes and royalties, the Alaska Supreme Court reasoned that petroleum revenues are "analytically, equivalent to 'taxes which only residents pay.'" *Carlson v. State,* 798 P.2d 1269, 1278 (Alaska 1990).

The formula is: (Fisheries Budget/Alaska Population) X (percentage of State Budget from oil revenues/1.0). *State Commercial Fisheries Entry v. Carlson*, 65 P.3d 851, 863 (Alaska 2003), App. 26-27. The first step in the formula divides the state's expenditures that support commercial fisheries in a given year, its "fisheries budget," by the number of Alaska residents that year. The quotient is the state's per-resident expenditures for commercial fisheries management from all revenue sources. The next step multiplies the per-resident, all-revenues expenditures by a factor that represents the percentage of revenues that year which were derived from oil production. The result is the amount that each Alaska resident paid that year for commercial fisheries management from his petroleum revenues. This amount is the difference between what Alaska charges a resident commercial fisher and what it may charge a nonresident fisher for the opportunity to

participate in the state's commercial fisheries that year. It is this fee differential that the class challenges here.

### 5. The Impact of the Resident-Nonresident Fee Differential on Nonresident Participation in Alaska's Commercial Fisheries

As stated above, a major cost for most persons entering Alaska's commercial fisheries is the purchase price of entry permits, which is unaffected by residency. The annual permit and license fees paid to Alaska are insignificant compared to the permit purchase price and the many other fixed costs of commercial fishing that are common to resident and nonresident fishers alike (costs such as the purchase and maintenance of vessels and gear, moorage and storage fees, fuel, supplies, and crew wages). The fees are also insignificant compared to the economic return from participating in Alaska commercial fisheries.[3]

The class has provided no evidence that the fee differential has discouraged nonresidents from participating in Alaska commercial fisheries. In fact, since the inception of Alaska's limited entry program in 1973, the

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[3] For example, a high value fishery having a $500 fee differential – the highest differential charged – had average gross earnings per permit that ranged, from 1984 through 2001, between $88,700 and $272,181. For the same period, a low value fishery having a $100 fee differential – the lowest differential charged – had average gross earnings per permit between $2,621 and $8,187. Commercial Fisheries Entry Commission, *Basic Information Table,* available at www.cfec.state.ak.us.

percentage of entry permits held by nonresidents has increased.[4]

### 6. The Alaska Supreme Court's Decisions in *Carlson I* and *Carlson II* and the Class's First Petition for a Writ of Certiorari

The petitioners ("the class") filed a class action in 1984 challenging the fee differential. Among other allegations, the class claimed that the differential violates two clauses of the United States Constitution – the Privileges and Immunities Clause, art. IV, § 2, and the Commerce Clause, art. I, § 8. When the Alaska trial court ruled in the state's favor, the class appealed to the Alaska Supreme Court.

In 1990, the Alaska Supreme Court issued its first decision on the fee differential. *Carlson v. State*, 798 P.2d 1269 (Alaska 1990) (*Carlson I*). The court held that the proper inquiry under the Privileges and Immunities Clause was whether all the fees and taxes that nonresident fishers paid to participate in Alaska commercial fisheries were substantially equal to those paid by resident commercial fishers. *Id.* at 1278. The court held that the inquiry should account for residents' proportionate shares of state revenues to which nonresidents make no contribution and that the state spends on commercial fisheries management. *Id.* It also held that state revenues derived from petroleum production are analytically equivalent to

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[4] The percentage of entry permits held by nonresidents has risen from 18% to 22.5%. Commercial Fisheries Entry Commission, *Executive Summary – Changes in the Distribution of Alaska's Commercial Fishery Entry Permits, 1975-2001* (Report No. 02-2N-EXEC) at 6, Table 2, available at www.cfec.state.ak.us.

taxes that only residents pay. *Id.* The court remanded the case for an accounting of those revenues and for several other inquiries. *Id.* at 1278, 1280. It left open the question of whether the differential is reviewable under the Commerce Clause. *Id.* at 1276-77 n.4.

On remand, the Alaska trial court decided that the fee differential does not violate either the Commerce Clause or the Privileges and Immunities Clause. Again, the class appealed.

In its second review of the fee differential, the Alaska Supreme Court decided that the differential does not implicate the Commerce Clause. *Carlson v. State, Commercial Fisheries*, 919 P.2d 1337, 1344 (Alaska 1996) (*Carlson II*). The court observed that the differential is not predicated on the movement of articles across state lines, but rather on the residency of persons paying the annual permit and license fees. *Id.* at 1340. The court also decided that, in analyzing the Privileges and Immunities claim, the trial court had applied the incorrect formula for calculating a constitutional fee differential, so it remanded the case for application of a different formula. *Id.* at 1344.

The class then filed a petition for writ of certiorari with this Court. It asked the Court to review whether the fee differential violates the Commerce Clause and the Privileges and Immunities Clause. The Court denied the petition. *Carlson v. Alaska Commercial Fisheries Entry Comm'n*, 519 U.S. 1101 (1997).

### 7. The Alaska Supreme Court's Decision in *Carlson III* and the Present Petition for Writ of Certiorari

During the late 1990's, the class and the state continued to litigate several issues before the Alaska trial court. Those issues included what types of fisheries management costs, borne by the state, may be counted in the fee formula. After the trial court issued its decision, the state filed an appeal with the Alaska Supreme Court, and the class filed a cross-appeal. In its cross-appeal, the class asked the Alaska Supreme Court to reconsider its earlier argument that the state's fee differential violates the Commerce Clause.

The Alaska Supreme Court declined to readdress the constitutional issues that it had already resolved in *Carlson II*. *State Commercial Fisheries Entry v. Carlson*, 65 P.3d 851, 859 (2003), App. 16 (*Carlson III*). It considered the impact of several Commerce Clause decisions this Court had issued after *Carlson II,* but concluded that these intervening decisions did not conflict with its earlier resolution of the class's Commerce Clause claim. App. 19-29.

Thus, in its third decision in this case, the Alaska Supreme Court did not finally rule on the ultimate question the case raises – the constitutionality of the state's resident-nonresident fee differential. It ruled only on cost components for its fee-differential formula, and on several fee refund issues. App. 29-57. It remanded the case for a determination of whether the actual fees that Alaska has charged resident and nonresident fishers substantially exceeded the allowable fee differential calculated under the formula. App. 28-29.

After the *Carlson III* decision, the class filed the current petition. The class again presents essentially the same arguments it raised seven years ago in its earlier unsuccessful petition. The class again asks this court to review and overturn two rulings of the Alaska Supreme Court: (1) that the dormant Commerce Clause is not implicated by resident-nonresident fee differentials that are predicated on residency, and (2) that under the Privileges and Immunities Clause, the state may credit residents with the proportionate share of their petroleum revenues that it spends for commercial fisheries management when it sets resident-nonresident commercial fishing fees.

## REASONS FOR DENYING THE PETITION

### I. THE ALASKA SUPREME COURT'S RULINGS ARE INTERLOCUTORY BECAUSE THE COURT HAS NOT YET DECIDED THE PRINCIPAL QUESTION – WHETHER THE STATE'S RESIDENT-NONRESIDENT FEE DIFFERENTIAL IS CONSTITUTIONAL.

The Court may review state litigation only after the highest state court has rendered "final judgments or decrees." 28 U.S.C. § 1257. There is a final judgment when it can be said that "there is nothing more to be decided" and there has "been an effective determination of the litigation." *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 72 (1946) (quoting *Clark v. Willard*, 292 U.S. 112, 118 (1934) and *Market Street Ry. Co. v. Railroad Commission,* 324 U.S. 548, 551 (1945)). When a state court has resolved only one of several issues, this court has declined to review the state court's decision. *Collins v.*

*Miller*, 252 U.S. 364 (1920). That is especially true when the unresolved issues could generate additional federal questions. *See Republic Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1948). It is consistent with the Court's policy against "fragmentary review." *Id.*

In certain limited circumstances, this court has found finality on a federal issue despite the fact that further proceedings are forthcoming in the state courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485 (1975). In these cases, however, the additional proceedings would almost never resolve other federal questions that might also qualify for review by this Court at a later date. *Id.* at 477. That is not the case here. The issue now on remand to the lower Alaska court is a federal question – whether the fee differential is constitutional when measured by the Alaska Supreme Court's formula arising under the Privileges and Immunities Clause. The final rulings of the Alaska courts on that question, as well as the formula itself, would be subject to review by this Court.

Further, the Alaska Court's decision on that issue could moot the Commerce Clause issue raised by the current petition. On remand in the present case, the Alaska courts could decide that the class prevails on its claim that the fee differential violates the Privileges and Immunities Clause. That would make unnecessary a decision from this Court on whether the differential also implicates the Commerce Clause and, if it does, whether it violates that clause.

The class did not address finality in its petition. If it does so in reply, two principles will govern. First, the class bears the burden of affirmatively establishing this Court's jurisdiction. *Memphis Natural Gas Co. v. Beeler*, 315 U.S.

649, 651 (1942). Second, "the policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." *Republic Gas Co.*, 334 U.S. at 71. If the class does not meet its burden, the Court should deny the petition.

## II. THE ALASKA SUPREME COURT'S RULING THAT THE STATE'S FEE DIFFERENTIAL DOES NOT IMPLICATE THE COMMERCE CLAUSE IS CONSISTENT WITH THIS COURT'S DECISIONS.

In *Carlson II*, the Alaska Supreme Court declined to review the state's fee differential under the Commerce Clause because the differential is predicated solely on a person's residency, and not on the movement of articles in interstate commerce. *Carlson*, 919 P.2d at 1340.

The class argues that the Commerce Clause applies because its members are engaged in interstate commerce, asserting that "* * * this Court has long recognized that commercial fishing is by its very nature an *interstate, commercial* enterprise * * *." Pet. at 12. Alaska's fee differential, however, does not target the interstate commerce of commercial fishers. The commercial activity that distinguishes commercial fishers from other types of seafood harvesters is that commercial fishers may *sell* their product. Their commerce is the selling of fish, sometimes in interstate markets. But the fee differential does not impact this sale – it does not prohibit or place a greater tax on commercially harvested fish that are exported out of the state or a surcharge on fish that are harvested by nonresidents. Alaska, therefore, does not place a heavier burden on the activity that renders class members "commercial" fishers.

The class seems to argue that the commercial activity that the fee differential affects is the travel of its members across state lines. Citing to decisions by this Court, the class claims that "the nonresident fishermen who travel to Alaska to fish * * * generate the same sort of interstate 'commerce' as the campers in *Camp Newfound* and the indigent who traveled to California in *Edwards.*" Pet. at 11.

Unlike the tax break in *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), however, Alaska's fee differential is not directed at a provider of services or products who engages in interstate commerce. In *Camps Newfound*, the petitioner summer camp catered to nonresidents, marketing its services to campers across the country, and thus, generated the transportation of persons across state lines. The Court said that, in this respect, summer camps are comparable to hotels that offer goods and services that are consumed locally. *Id.* at 573. For this reason, a statute that granted a tax benefit to summer camps principally serving resident campers unduly burdened interstate commerce. *Id.* at 595. But the Alaska Supreme Court found no analogy between the campers in *Camps Newfound* and commercial fishers entering Alaska. App. 25-26. Alaska law makes no distinction between resident and nonresident fishers in its regulation of their interstate commercial activity, providing fish for sale.

The situation in *Edwards v. California*, 314 U.S. 160 (1941), is similarly distinguishable. At issue in that case was a California law making it a crime to knowingly bring a nonresident indigent into the state. *Id.* at 171. The law was predicated on interstate commerce because an offense was committed when a nonresident indigent was

transported across the border into California. Here, there is no legal consequence when a nonresident fisher crosses the border into Alaska.

The class's argument is based on the premise that resident-nonresident fee differentials inherently implicate the Commerce Clause because they may impact interstate travel. If that were true, all such fee differentials would be subject to Commerce Clause scrutiny, including, for example, differences in tuition paid by residents and nonresidents to attend a state-supported university. The class might try to distinguish university tuition by arguing that unlike commercial fishers, students do not cross borders to engage in a vocation that leads to interstate commerce. However, the commercial activity here – the selling of fish – is a remote, downstream event, unassociated with the nonresidents' entry into Alaska and not impacted by the fee differential.

Thus, the class must be arguing that the Commerce Clause is implicated because nonresident fishers *eventually* engage in commercial activity. They take this position despite the fact that crossing the border into Alaska is not subject to discrimination and despite the fact that the interstate sale of their commercial catch is not subject to discrimination. If it were successful, this argument would expand the reach of the Commerce Clause far beyond current understanding.

The class also disputes the Alaska Supreme Court's observation that this Court's opinions suggest that the Commerce Clause does not apply to fish until they are harvested. *Carlson I,* 798 P.2d at 1276 n.4; *Carlson II*, 919 P.2d at 1340 n.8. This observation is strongly supported by this Court's caselaw, however. The idea that the Commerce

Clause attaches to wildlife only when it is taken first surfaced in a dissent written in *Greer v. Connecticut*, 161 U.S. 519 (1896).[5] Later, the Court expressed the rationale in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928),[6] and in *Toomer v. Witsell*, 344 U.S. 385 (1948).[7] In *Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979), the Court noted that the view of the *Greer* dissenters had prevailed in later cases. And while the Court has never directly stated that unharvested wildlife cannot be an article of interstate commerce, a number of lower courts have based decisions on this point.[8] Nevertheless, the class argues that the rationale has been "soundly discredited" by two decisions of this Court, *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981), and *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Pet. at 13.

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[5] The *Greer* dissenters' view was that "When property, like the game birds in this case, is reduced to possession, it becomes an article of commerce . . . . " *Id.* at 541 (Field, J., dissenting).

[6] In *Foster-Fountain*, the Court struck down a statute prohibiting the transport of shrimp until after the head and shell were removed. The Court declared, "As to such shrimp, the protection of the commerce clause attached *at the time of taking*." *Id.* at 13 (emphasis added).

[7] In *Toomer*, the Court stated that "the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." *Id.* at 394-395.

[8] *See, e.g., Terk v. Ruch*, 655 F.Supp. 205, 215 (D.Colo. 1987) (court dismissed Commerce Clause claim, holding that wild sheep and goats were not articles of commerce); *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F.Supp. 1287, 1306 (E.D.Va. 1982) (plaintiff failed to establish that unharvested crabs are articles of commerce); *Shepherd v. State, Dept. of Fish & Game*, 897 P.2d 33, 41 (Alaska 1995) (affirming the lower court's conclusion that unharvested game is not an article of commerce).

In *Commonwealth Edison*, the Court reviewed a Montana severance tax that was imposed on coal mined in the state. The Court rejected the argument that because the taxable event, removing the coal from the earth, was a "local" activity that preceded entry of the coal into interstate commerce, the tax was not reviewable under the Commerce Clause. *Id.*, 453 U.S. at 617. Instead, the Court said that the proper inquiry is whether state taxes levied on local activities preceding the entry of goods into interstate commerce may substantially affect that commerce. *Id.* at 616. The Court eventually upheld the tax after applying a four-part test, announced earlier in *Complete Auto Transit*, that it uses to examine state taxes under the Commerce Clause. *Id.* at 629.

Without question, *Commonwealth Edison* and *Complete Auto Transit* stand for the proposition that a state might place a tax on an article before it enters the stream of interstate commerce in a way that substantially affects that commerce, thus implicating the Commerce Clause. But those decisions presume that there is an article, in the first place, that is capable of entering commerce. For this reason, these cases do nothing to discredit the Court's view that the Commerce Clause does not attach to wildlife until it is harvested. The challenged statute in *Commonwealth Edison* did not charge a higher fee for a permit to mine; at issue was a severance tax on each ton of coal after it was mined. This would be comparable to Alaska charging a fee for each fish a commercial fisher caught, which is consistent with this Court's view that the resource has a different impact on the Commerce Clause after it is harvested. Further, coal is inherently different than fish in that someone has a property interest in coal even before it is mined. In contrast, no commercial fisher has a property

interest in the fish he might catch, so a permit or license fee to fish is more akin to a business license than it is to a tax on articles of commerce that the business may produce.

The rationale underlying the line of cases holding that fish and game cannot implicate the Commerce Clause until harvested is self-evident. Wild, free-roaming animals cannot be introduced into commerce until they have been reduced to human possession, that is, until they have been caught. Therefore, a state's regulation of the aspects of harvest, including annual fees it assesses on the harvesters, cannot, standing alone, affect interstate commerce. That rationale is still viable notwithstanding the decisions cited by the class.

## III. THE ALASKA SUPREME COURT'S RULING THAT A STATE, WHEN IMPOSING FEES FOR A STATE-PROVIDED SERVICE, MAY ATTRIBUTE TO ITS RESIDENTS THE TAXES THAT THEY PAY FOR THAT SERVICE IS CONSISTENT WITH THIS COURT'S DECISIONS.

The Alaska Supreme Court directed the trial court on remand to analyze the fee differential under a formula that credits resident commercial fishers with their proportionate share of the cost of commercial fisheries management that is paid for with taxes that only residents pay. It follows the holding of *Toomer v. Witsell* that a state does not violate the Privileges and Immunities Clause by "charg[ing] non-residents a differential which would merely compensate the State * * * for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 398, 399.

Both *Toomer* and the Alaska Supreme Court recognize that when a state assesses fees for a service, attributing to residents their proportion of state taxes for that service is necessary to treat residents and nonresidents "on terms of substantial equality." *Id.* at 396. If residents and nonresidents were charged an identical fee, the residents would pay *more* than the nonresidents for those services when their proportionate tax payments for the same services are taken into account. In essence, the residents would be *overcharged* by the amount that their proportionate taxes pay for that service.

Despite this, the class argues that Alaska should be precluded from attributing to its residents their proportionate payments for commercial fishery management. Pet. at 17. They argue that the language in *Toomer*, quoted above, is dictum, and that the Court's treatment of the compensatory tax doctrine under the Commerce Clause prevents Alaska from attributing resident taxes under the Privileges and Immunities Clause. *Id.*

Although the class casts its argument in terms of the Privileges and Immunities Clause, it does not discuss opinions that interpret that clause. Instead, the class relies on *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93 (1994), *Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996), and other decisions that exclusively interpret the Commerce Clause. Pet. at 17-23. The class treats the two clauses as perfectly interchangeable and accordingly, believes that interpretations of one may be shifted, wholesale, to the other. The class declares that Alaska's fee differential "plainly fails under this Court's compensatory tax jurisprudence," and launches into a point-by-point analysis of that alleged failure. Pet. at 20.

This argument requires, however, that principles derived from the compensatory tax doctrine be transposed in a manner that negates *Toomer*'s statement that states may attribute to their residents the taxes that they pay for state-provided services. *Toomer*, 334 U.S. at 398, 399. This Court has never called into question the continuing validity of that passage, which serves as the basis of the Alaska Supreme Court's fee formula.

Nor has this Court ever transposed wholesale principles derived from the Commerce Clause to interpretations of the Privileges and Immunities Clause, and for good reason. Although the two clauses share a common origin and have similar analyses,[9] they address two different types of discrimination – discrimination against articles traveling across state lines as opposed to discrimination against nonresidents pursuing a livelihood or other important interest.

Challenges based on these clauses also require different inquiries. Under the compensatory tax doctrine, a state must justify a tax on interstate commerce by identifying an *offsetting tax imposed on intrastate commerce.* Under the *Toomer* tax-attribution doctrine, a state must justify a fee against nonresidents by identifying *offsetting fees paid by residents through the taxes they pay for that state-provided service.* The inquiries are not interchangeable. In fact, they are incongruous, as this case demonstrates. Here, it is futile to search for a compensatory

[9] Both clauses have their origin in the Fourth Article of the Articles of Confederation and have a shared view of federalism. *See Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

intrastate tax – an analytical step under the compensatory tax doctrine – when Alaska's fee differential is predicated on residency, not on articles moving inside the state or across its borders.

Another reason that the compensatory tax doctrine does not fit is because Alaska's annual commercial fishing fees are more like "user fees" than they are taxes.[10] User fees are not subject to the same analysis as are compensatory taxes.[11] Thus, even if Alaska's fees were reviewable under the Commerce Clause, the compensatory tax doctrine would not be part of that review.

To conclude its petition, the class argues that the fee formula allows Alaska to charge nonresidents far more than *Toomer* permits. The class focuses on *Toomer*'s phrase

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[10] Under the Commerce Clause, the Court distinguishes "user fees" from "compensatory taxes." A "user fee" is a "charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison*, 453 U.S. at 621. *See also Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). It follows that a "compensatory tax" occurs when the transportation, facility, or service used by the nonresident payer is furnished by private entities.

[11] Regarding user fees and taxes, the Court said, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Commonwealth Edison*, 453 U.S. at 622 n.12 (quoting *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931)). "Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing * * * that 'the fees charged do not appear to be manifestly disproportionate to the services rendered * * *.'" *Id.* (quoting *Clark*, 306 U.S. at 599). *See also Evansville-Vanderburgh Airport Authority Dist.*, 405 U.S. at 707, 716-17 (1972).

"conservation expenditures," and argues that this term is narrower than the cost factor used in the state's formula, the "fisheries budget." Pet. at 24-26. The "fisheries budget," as the Alaska Supreme Court described it, is "what the State spends from its general funds on its commercial fisheries." App. at 30. This reflects the fact that the state's financial support of the commercial fishing industry serves not only to conserve existing fishery resources, but also to enhance those resources through the construction of fish hatcheries, to protect them through adequate law enforcement, and to allocate them among various types of harvesters.

*Toomer* does not hold that a state may credit its residents with only "conservation expenditures." *Toomer*'s rationale allows a state to credit its residents with resident-only revenues that pay for the state-provided service, and here the service that Alaska provides, commercial fisheries management, logically and practically covers more than the class's view of "conservation."

Further, the Alaska Legislature and courts have enacted sideboards to prevent inclusion of inappropriate costs for setting the fee differential. The statute adopted by the Alaska Legislature to implement the formula identifies the types of expenditures and costs that may be counted in the formula's "fisheries budget" factor. App. 58-60. Subsequently, the Alaska Supreme Court in *Carlson III* further narrowed the list of cost components that may be counted in the formula. App. 34-36; 38-39. What remains in place is a list of narrowly circumscribed, quantifiable components that clearly and directly support commercial fisheries.

## CONCLUSION

The petition should be denied.

Respectfully submitted.

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September 12, 2003

*Notice: This opinion is subject to correction before publication in the* ***Pacific Reporter****. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, e-mail corrections appellate.courts.state.ak.us.*

THE SUPREME COURT OF THE STATE OF ALASKA

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| STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,<br><br>Appellant/ Cross-Appellee,<br><br>v.<br><br>DONALD H. CARLSON; WARREN HART; GERARD HASKINS; EARL WEESE; and LYLA C. WEESE, Individually and as Class Representatives on Behalf of All Persons Similarly Situated,<br><br>Appellees/ Cross-Appellants. | Supreme Court Nos. S-10091/10101<br><br>Superior Court No. 3AN-84-5790-CI<br><br>OPINION<br><br>[No. 5673 – March 14, 2003] |

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge.

Appearances: Stephen M. White, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellant/Cross-Appellee. Loren Domke, Loren Domke, P.C., Juneau, for Appellees/Cross-Appellants.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

FABE, Chief Justice.

## I. INTRODUCTION

This is the third appeal arising out of a lawsuit centering on whether Alaska can charge nonresidents more for commercial fishing licenses than it charges resident commercial fishers. The case is brought as a class action by a group of nonresident commercial fishers. In previous rulings in this case, we held that different rates can be charged for resident and nonresident commercial fishers, and we derived a formula for calculating the acceptable difference. The components of this formula, including various budget expenditures and oil revenues, are in dispute in this appeal. We conclude that direct and indirect costs associated with the fisheries budget and costs associated with the hatcheries loan fund can be included in the calculation of the allowable fee differential. We further hold that at an earlier stage in this litigation the State conceded that the protest requirement for recovery of overpayment of taxes has been satisfied. Finally, we hold that prejudgment interest will be applicable if on remand it is determined that a refund of a portion of fees is required.

## II. FACTS AND PROCEEDINGS

Litigation in this case began in 1984. At the time this case was first before this court, nonresident commercial

fishers were charged three times as much as resident fishers for fishing license fees.[1] The relevant statute at the time, AS 16.05.480(a), dealt primarily with authorizing the establishment of fees for commercial fishing: "A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents." The relevant current statute, AS 16.05.480(h), establishes: "For a crewmember fishing license[2] issued for calendar year 2002 and following years, a nonresident engaged in commercial fishing who is 11 years of age or older and who does not hold an entry permit or an interim-use permit shall pay an annual base fee of $60 plus an amount, established by the department by regulation, that is as close as is practicable to the maximum allowed by law." The principal difference is that the current statute does not set the amount which non-residents can be charged, but rather allows this amount to be set at the maximum legal amount.[3]

A similar fee structure is established for entry permits and interim-use permits where the creation of limited use zones is deemed necessary for controlling, through the permitting process, the number of people who can fish in a

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[1] Carlson v. State, Commercial Fisheries Entry Comm'n (Carlson I), 798 P.2d 1269, 1270 (Alaska 1990).

[2] "Crewmember fishing license" and "commercial fishing license" are used interchangeably in AS 16.05.480 with no apparent distinction made between the two. A "commercial fisherman" is elsewhere defined to include crewmembers. AS 16.05.940(4).

[3] This amount is to be set by the Alaska Commercial Fisheries Entry Commission. AS 16.43.100(16) (authorizing commission to "establish reasonable user fees for services").

given geographic area.[4] However, in 2001 the fees for nonresidents were three times the amount for residents.[5] Crewmembers are not required to have entry or interim-use permits, although they are required to have a commercial (crewmember) fishing permit to work on a permit

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[4] *See generally* AS 16.43.200-.225.

[5] The relevant sections of former 20 Alaska Administrative Code (AAC) 05.240(a)(1), (2), (4) (2002) provide:

(a) For 2001, the commission will determine the annual fee for the issuance or renewal of an entry permit or interim-use permit according to the following:

> (1) the resident annual fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is .25 percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection; the non-resident annual fee is three times this amount, as set out in (4) of this subsection; . . .
>
> (2) the resident annual fee for the issuance or renewal of an interim-use permit in an unlimited fishery is .25 percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection; the non-resident fee is three times this amount, as set out in (4) of this subsection;
>
> . . . .
>
> (4) the resident and non-resident annual fees are:

| FEE CLASS | ANNUAL FEE | |
|---|---|---|
| | Resident | Non-resident |
| I | $250 | $750 |
| II | 200 | 600 |
| III | 150 | 450 |
| IV | 100 | 300 |
| V | 50 | 150 |

vessel.[6] The class never specifically stated in its brief that it is challenging both commercial fishing licenses and entry permit fees, but one of the challenged superior court orders states that it applies to both "commercial licenses and limited entry permits." Furthermore, *Carlson I* defined the class as consisting of "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the State for commercial or gear licenses or permits."[7] This language was taken directly from the initial complaint. We therefore find it appropriate to address both commercial fishing licenses and entry permit fees. For the sake of simplicity, the two will be referred to collectively as "commercial

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[6] *See* AS 16.43.140(b) ("A permit is not required of a crewmember or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear."); AS 16.05.480(a) (2001) ("A person engaged in commercial fishing shall obtain a commercial fishing license and shall retain the license in possession and readily available for inspection during fishing operations. An entry permit or interim-use permit entitles the holder to participate as a gear operator in the fishery for which the permit is issued and to participate as a crewmember in any fishery."); AS 16.05.940(4) ("'[C]ommercial fisherman' means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise."); AS 16.05.940(5) ("'[C]ommercial fishing' means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels.").

[7] *Carlson I*, 798 P.2d at 1270.

fishing fees," except in those instances where it is necessary to differentiate between the two.

### A. Prior Case History Before the Alaska Supreme Court

Before proceeding with the issues in the present case, it is helpful to review the decisions in the previous appeals before this court. In *Carlson I,* we held that different fees for residents and nonresidents did not automatically violate either the Privileges and Immunities Clause or the Commerce Clause of the United States Constitution.[8] We noted that "[l]ess favorable treatment by the state towards nonresidents runs afoul of the Privileges and Immunities Clause if: 1) the activity in question is 'sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the [clause], *and* 2)[it] is not closely related to the advancement of a substantial state interest.'"[9] We proceeded to determine that "[c]ommercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are *prima facie* a violation of it."[10] We recognized that states may "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes

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[8] *Id.* at 1274-78.

[9] *Id.* at 1274 (quoting *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 64-65 (1988) (citations omitted)).

[10] *Carlson I,* 798 P.2d at 1274.

which only residents pay."[11] Because the appropriateness of a 3:1 fee differential had not been addressed, we remanded the case for such a determination, placing the burden of persuasion on the State.[12]

We conducted a similar analysis with regard to the Commerce Clause. Noting that the Commerce Clause "limits the power of the States to erect barriers against interstate trade,"[13] we concluded that if a law is shown to discriminate against interstate commerce, either in its wording or in its effect, the burden is on the State "to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."[14] We held that the superior court improperly relied upon *Salorio v. Glaser*[15] in granting summary judgment to the State.[16] We determined that applying *Salorio,* in which New Jersey imposed additional fees on nonresidents to pay for transportation facilities,[17] to the present case would result in nonresidents subsidizing the activities of residents because nonresidents could then be required "to pay up to 100% of their *pro rata* share of expenditures regardless of what percentage of their *pro rata* share residents are in

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[11] *Id.* at 1274-75 (quoting *Toomer v. Witsell,* 334 U.S. 385, 399 (1948)).

[12] *Carlson I,* 798 P.2d at 1276, 1278.

[13] *Id.* at 1277 (quoting *Maine v. Taylor,* 477 U.S. 131, 137 (1986)).

[14] *Carlson I,* 798 P.2d at 1277 (quoting *Maine v. Taylor,* 477 U.S. at 138).

[15] 414 A.2d 943, *cert. denied,* 449 U.S. 874 (1980).

[16] *Carlson I,* 798 P.2d at 1278.

[17] 414 A.2d at 953.

fact paying."[18] However, because the majority of the state revenues are derived from petroleum production, a source to which nonresident fishers make no contribution, we ruled that the State could recoup conservation expenditures from nonresidents in the form of differential fees.[19] We reasoned that the oil revenues spent on conservation "could have been used to benefit residents through various other programs and they are, analytically, equivalent to 'taxes which only residents pay.'"[20] In that the extensive use of oil revenues as a source for state expenditures created a greater financial burden on nonresidents than residents, a fee differential based upon residency was justified.[21] Consequently, "the state may equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference."[22] This is the same conclusion that was reached in the Privileges and Immunities Clause analysis. Consequently, we remanded the case for a further determination of the appropriateness of the fees.[23]

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[18] *Carlson I*, 798 P.2d at 1278.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* We made two other rulings in *Carlson I*: We held that the Commercial Fisheries Entry Commission was authorized by statute to impose different commercial fishing fees, assuming that the ratio itself was constitutional. *Id.* at 1278-79. We also remanded on the issue of whether the protest requirement in AS 43.15.010(a) had been met. *Id.* at 1279-80. We further noted on this issue that a two-year statute of

(Continued on following page)

In *Carlson II,* we addressed the question of what would be an acceptable fee differential for nonresidents to pay.[24] We first affirmed our decision in *Carlson I* that neither the Commerce Clause nor the Privileges and Immunities Clause prevented the imposition of an increased fee for nonresident commercial fishers.[25] The class had argued that two cases, which held that states violated the negative (also known as dormant) Commerce Clause by charging greater taxes on out-of-state waste than on in-state waste, decided by the United States Supreme Court after *Carlson I* but before *Carlson II,* were applicable to the present case.[26] We distinguished these two cases by holding that the facts in the present case did not involve the "interstate flow of *articles of commerce.*"[27] In response to the class's Privileges and Immunities Clause argument, we stated that we did not in *Carlson I* advance the type of fee-shifting arrangement denounced in *Oregon Waste Systems,* but rather explicitly held that nonresidents could be required to pay only that amount that would make

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limitations from the time the tax was paid governed instead of the six-year limit assumed by the superior court. *Id.* at 1280.

[24] *Carlson v. State, Commercial Fisheries Entry Comm'n* (*Carlson II*), 919 P.2d 1337 (Alaska 1996). Certiorari was subsequently requested but denied. 519 U.S. 1101 (1997).

[25] *Id.* at 1340-42.

[26] *Carlson II,* 919 P.2d at 1340 (citing *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994); *Chemical Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 340-41 (1992)).

[27] *Carlson II,* 919 P.2d at 1340 (citing *Oregon Waste Sys.,* 511 U.S. at 98).

their contribution to state-provided benefits substantially equal to the contribution of similarly situated residents.[28]

Accepting the constitutionality of the fee differences, we next determined a formula for allowable differences. We adopted the per capita fee differential formula advocated by the class as opposed to the pro rata formula offered by the State, holding that the allowable fee differential could be determined by: (Fisheries Budget/Alaska Population) X (percentage of State Budget from oil revenues/1.0).[29] We rejected the State's proposed formula[30] because it improperly compared the contributions made by nonresident commercial fishers to those made only by resident commercial fishers, rather than viewing the resource expenditures benefitting the nonresidents in terms of the population of the state as a whole:[31]

> Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other

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[28] *Carlson II*, 919 P.2d at 1340.

[29] *Id.* at 1342-43.

[30] The State had advocated the following pro rata formula: "(1) calculate the expenditures or costs of the commercial fisheries (enforcement and conservation); (2) determine the resident and nonresident commercial fishers' respective *pro rata* shares of those expenditures; and (3) compare the percentage of its respective *pro rata* share each group is paying." *Id.* at 1343.

[31] A similar plan was rejected by the Fourth Circuit, which overturned a Virginia law that required all fishers to pay a fee determined by dividing the state costs of fishing funded by all taxpayers by the number of fishers in the state, requiring as a result that nonresident fishers pay an additional $1,150 fee. *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 268 (4th Cir. 993).

> benefits or State services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis.[32]

We remanded the case to the superior court to determine if, under the formula adopted, the nonresident fee differential exceeded the resident contribution, including the forgone oil revenues of the average Alaska resident.[33] The superior court on remand was also to address what budget figures should be included in executing the formula.[34]

On the issues of refunds to the class and prejudgment interest, we recognized that "the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210."[35] The class admitted that it could not have satisfied the protest requirement before then and thus would not seek a refund for any fees prior to that date.[36] We remanded the case to determine if the action of filing suit constitutes sufficient notice to satisfy the requirements of AS 43.10.210(a)[37] and to determine

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[32] *Carlson II*, 919 P.2d at 1343.

[33] *Id.* at 1344.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] The statute provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if

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whether, if the class ultimately prevails, prejudgment interest is due.[38]

### B. Recent Case History After Remand to the Alaska Superior Court

On July 17, 1998, Superior Court Judge Peter A. Michalski issued an opinion addressing class decertification and prejudgment interest. Judge Michalski denied the State's motion for class decertification because all four components of class certification – numerosity, commonality, typicality, and adequacy of representation – were met. The State had argued that because the class shifted its legal theory from common law theories of assumpsit to a statutory argument, the original class certification under Alaska Civil Rule 23(b)(2) must be reexamined. The State further argued that numerosity did not exist because only the named parties actually protested the fee differential; conceded that commonality existed; asserted that because different permits and fees were involved, there was no typicality of claims; and contended that the variety of remedies that the legislature could adopt if the fees were found to be unconstitutional rendered it impossible for there to be adequacy of representation. The superior court held that the State did not provide a sufficient change in

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(1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax; or

(2) in the absence of a judgment, it is obvious to the Department of Revenue that the taxpayer would obtain judgment if legal proceedings were prosecuted by the taxpayer.

[38] *Carlson II*, 919 P.2d at 1344.

circumstances to justify decertifying the class and noted that speculation as to how the legislature might react to a ruling was also not grounds for decertification. Judge Michalski further ruled that the status of a class as a "unified legal entity" overrode the State's interest in making distinctions between class members. Consequently, the superior court concluded that "no distinctions will be made among class members when determining whether the state waived the protest requirement or whether the class met the protest requirement."

In addition, the superior court held that notice to the State existed as of December 13, 1984. The State had argued that every member of the class was required to protest to obtain any refund. However, Judge Michalski, quoting *Principal Mutual Life Insurance v. State, Division of Insurance*,[39] stated that the purpose of the protest requirement was to provide the State "with notice of the claimed tax illegality, the grounds advanced in support of the claimed illegality, and [to] afford[ ] the state the opportunity to fashion budget appropriations, or expenditures, taking into account the magnitude of the claimed tax illegality." Because the class was defined extensively enough to include all commercial license and permit holders, Judge Michalski held that the State should have known the magnitude of the potential claims and budgeted appropriately. It was therefore not necessary for each class member to protest the fee differential because to impose such a requirement would be a mere technicality. Judge Michalski thus held that the protest requirement of AS

[39] 780 P.2d 1023, 1030-31 (Alaska 1989).

43.10.210(a) was satisfied by the certification of the class in the suit.

As to prejudgment interest, the State asserted that AS 45.45.010, which had been invoked in *Carlson II* as the basis for a determination of whether prejudgment interest was due,[40] only set the maximum interest rate and did not specifically authorize prejudgment interest. The superior court conceded that the State's interpretation of AS 45.45.010 was correct, but concluded that this court intended the superior court to look beyond just that statute in addressing the issue of prejudgment interest. Looking to AS 43.05.280, the superior court determined that interest was allowed on an overpayment of taxes. Because we held in *Carlson I* that Title 43 applied to the present case even though fees, and not taxes, were involved,[41] Judge Michalski held that the class could recover prejudgment interest on their overpaid commercial fishing fees were they ultimately to prevail on their claim.

Left undecided was the issue of what comprised the different components of the formula derived in *Carlson II*. This was resolved by the superior court at an evidentiary hearing held June 12-14, 2000. The court adopted the State's methodology for computing the fisheries budget with regard to both direct and indirect operating expenditures, but agreed with the class that general government costs, capital costs, the hatcheries loan fund subsidy, and forgone revenue from fishery resources could not be included when computing the fisheries budget. The

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[40] 919 P.2d at 1344.

[41] 798 P.2d at 1280.

resulting fisheries budget for fiscal year 1996 was $127,289,000. Both sides agreed on the methodology for determining Alaska's population, namely the yearly estimate made by the Alaska Department of Labor, yielding a state population of 605,212 in fiscal year 1996. The superior court agreed with the State that the oil revenues component should "include general fund petroleum revenues, the draw on the constitutional budget reserve, and the net income from the Alaska Permanent Fund appropriated each year." In fiscal year 1996 this resulted in a calculation that seventy-four percent of the state budget came from oil revenues. From these figures, a maximum fee differential of $155.64 was calculated for fiscal year 1996. The parties were then ordered to use the methodologies adopted by the superior court to calculate the allowable fee differential back to December 13, 1984 and any corresponding refund that may be necessary. This accounting has not yet been made. The State appealed and Carlson cross-appealed.

## III. STANDARD OF REVIEW

The constitutionality of a statute and matters of constitutional or statutory interpretation are questions of law to which we apply our independent judgment.[42] We adopt the rule of law "that is most persuasive in light of precedent, reason, and policy."[43] Findings of fact are

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[42] *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 535 (Alaska 2002); *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

[43] *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001) (quoting *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

reviewed for clear error,[44] a standard that requires that great deference be given to the findings of the superior court.[45]

## IV. DISCUSSION

### A. We Decline To Readdress the Constitutional Issues Already Raised and Resolved in *Carlson II*.

The constitutionality of charging nonresidents more for commercial fishing licenses and permits has already been addressed, first in *Carlson I*[46] and then reaffirmed in *Carlson II*.[47] Whether we should readdress the issue here is a threshold question. In *Pratt & Whitney Canada, Inc. v. Sheehan,* we noted the importance of stare decisis but also recognized the need occasionally to deviate from existing

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[44] *See Vezey v. Green,* 35 P.3d 14, 19-20 (Alaska 2001) (citations omitted) ("We review the trial court's findings of fact under the clearly erroneous standard. Under this standard, we will reject a factual finding only if we are 'left with the definite and firm conviction on the entire record that a mistake has been committed.' In addition, we have stated that '[w]hen a trial court's decision of a factual issue depends largely on conflicting oral testimony, the trial court's competence to judge credibility of witnesses provides even a stronger basis for deference by the reviewing court.' "); *see also Rockstad v. Global Fin. & Inv. Co., Inc.,* 41 P.3d 583, 586 (Alaska 2002) ("[W]hen the trial court relies on extrinsic testimonial evidence to provide a factual basis for its interpretation of a contract, we apply the clearly erroneous standard in reviewing the court's background findings of fact.").

[45] *See Matanuska Elec. Ass'n, Inc. v. Rewire the Bd.,* 36 P.3d 685, 700-01 (Alaska 2001) (noting that use of clearly erroneous standard of review for factual findings in contempt proceedings "is consistent with the deferential review used by courts in other jurisdictions").

[46] 798 P.2d at 1274-78.

[47] 919 P.2d at 1340-42.

precedent.[48] We stated that we "will overrule a prior decision only when 'clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.'"[49] A prior ruling may be "originally erroneous" if it proves to be "unworkable in practice."[50] Changed conditions exist where "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [or] facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application."[51] This law of the case doctrine[52] maintains that issues previously adjudicated can only be reconsidered where there exist "exceptional circumstances"[53] presenting a

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[48] 852 P.2d 1173, 1175 (Alaska 1993) ("When a common law court is asked to overrule one of its prior decisions, the principle of stare decisis is implicated. . . . [S]tare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt those norms to society's changing demands.").

[49] *Id.* at 1176 (quoting *State v. Dunlop,* 721 P.2d 604, 610 (Alaska 1986)).

[50] *Pratt & Whitney Canada,* 852 P.2d at 1176.

[51] *Id.* (quoting *Planned Parenthood v. Casey,* 505 U.S. 833, 855 (1992)).

[52] *Wolff v. Arctic Bowl, Inc.,* 560 P.2d 758, 763 (Alaska 1977) ("The doctrine of the law of the case prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case. Even issues not explicitly discussed in the first appellate opinion, but directly involved with or 'necessarily inhering' in the decision will be considered the law of the case. This doctrine is akin to the doctrine of res judicata, in that it requires that a final judgment be rendered with respect to the issues at hand.") (citations omitted).

[53] *Patrick v. Sedwick,* 413 P.2d 169, 173-74 (Alaska 1966).

"clear error constituting a manifest injustice."[54] Once a case has been heard,[55] there are strong policy reasons for refusing to rehear it.[56]

The State accuses the class of rearguing the same case they brought in 1996, particularly with regard to the class's interpretation of *Oregon Waste Systems, Inc. v. Department of Environmental Quality,* which the United States Supreme Court decided in 1994.[57] The State dismisses the only two post-*Carlson II* cases cited by the class – *Fulton Corp. v. Faulkner*[58] and *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*[59] – as inapplicable to the present case.[60] The class counters that there is no final judgment necessary to invoke the law of the case

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[54] *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim Sch. Dist.,* 778 P.2d 581, 583 (Alaska 1989).

[55] *U.S. v. Hatter,* 532 U.S. 557, 566 (2001) ("The law of the case doctrine presumes a hearing on the merits.").

[56] *See Pratt & Whitney Canada,* 852 P.2d at 1175 ("[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it.") (quoting *Planned Parenthood,* 505 U.S. at 854).

[57] 511 U.S. 93 (1994).

[58] 516 U.S. 325 (1996).

[59] 520 U.S. 564 (1997).

[60] The State further argues that if there were anything questionable about the constitutionality of the fee differentials, the United States Supreme Court could have taken the case on certiorari but refused to do so. 519 U.S. 1101 (1997). However, the United States Supreme Court can deny certiorari for a variety of reasons. Therefore, denial of certiorari should not be taken as a judgment on the merits of the case. *See Bridgers v. Texas,* 532 U.S. 1034 (2001). It is easily conceivable that the Court refused certiorari because *Carlson II* was partially remanded and the Court wanted to wait to see what the final resolution of that case would be.

doctrine as delineated in *Wolff*.[61] The class further asserts that the law of the case doctrine is only a general principle and not an unyielding prohibition on revisiting prior decisions.[62] We agree with the State that our previous decisions on this issue preclude its reconsideration.[63]

The question before us is whether any legal precedent has arisen subsequent to *Carlson II* to indicate that that decision was somehow in error. A United States Supreme Court decision contradicting our holding in *Carlson II* would indicate a clear error and require us to revisit the issue of the constitutionality of the fee differentials. We interpret *Fulton* and *Camps Newfound* as clarifying the Supreme Court's position in *Oregon Waste Systems*; these two cases do not, however, alter the law in a way that would cause us to rethink our decision in *Carlson II*. We therefore do not believe that such a contradiction exists, nor do we find any other reason to revisit our holding in *Carlson II*.

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[61] The class asserts that the law of the case doctrine is meant primarily as a restraint on trial courts. While this may be one of the functions, it is certainly not the exclusive purpose of the doctrine.

[62] *See Smith v. Cleary*, 24 P.3d 1245, 1248 (Alaska 2001) ("The doctrine of the law of the case is a matter of judicial policy and describes 'the practice of courts generally to refuse to reopen what has been decided,' but does not limit their power to do so.") (quoting *West v. Buchanan*, 981 P.2d 1065, 1067 (Alaska 1999)) (citations omitted).

[63] *See Smith*, 24 P.3d at 1248 ("[T]he policy against reconsidering issues adjudicated in a prior appeal or issues 'directly involved with or necessarily inhering' in a prior decision applies only if there has been 'a final judgment . . . with respect to the issues at hand.'") (citations omitted); *Brandon v. State*, 839 P.2d 400, 403-04 (Alaska App.1992) ("The doctrine of the law of the case prohibits the reconsideration of issues that this court has adjudicated in a previous appeal in the same case.").

### 1. Fulton Corp. v. Faulkner[64]

*Fulton Corp. v. Faulkner* addressed an intangibles tax by the state of North Carolina on corporate stock. The tax was assessed on the fair market value of corporate stock owned by North Carolina residents.[65] However, residents were allowed to take a tax deduction equal to the percentage of the corporation's income that was subject to tax in North Carolina.[66] This resulted in an inverse relationship between the tax that North Carolina residents were required to pay and the extent to which the company did its business in North Carolina, such that, for example, if the company did all of its business within the state, a resident owning its stock would not be required to pay any intangibles tax on that stock.[67] The Court rejected this tax as a violation of the Commerce Clause.[68] The Court explicitly recognized the applicability of the dormant Commerce Clause to the case,[69] but further acknowledged that a tax that facially discriminates against interstate commerce may be constitutional if the effect on interstate commerce is incidental[70] or if the tax is designed to make those

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[64] 516 U.S. 325 (1996).

[65] *Id.* at 327.

[66] *Id.* at 328.

[67] *Id.*

[68] *Id.* at 346.

[69] *Id.* at 330 ("In its negative aspect, the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (internal quotations omitted).

[70] *Id.* at 331 ("In evaluating state regulatory measures under the dormant Commerce Clause, we have held that the first step . . . is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate

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engaged in interstate commerce bear the same economic burden as those engaged in intrastate commerce.[71] The Court then outlined a three-part test for determining if a compensatory tax was constitutional: (1) the State must identify the intrastate tax burden being compensated; (2) the tax must be shown to approximate but not exceed the burden on intrastate commerce; and (3) the events which are being taxed must be shown to be substantially equivalent between interstate and intrastate commerce.[72]

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commerce.") (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (internal quotations and citation omitted)).

[71] *Fulton*, 516 U.S. at 331 ("[A] facially discriminatory tax may still survive Commerce Clause scrutiny if it is a truly compensatory tax designed simply to make interstate commerce bear a burden already borne by intrastate commerce.") (internal quotations and citation omitted).

[72] *Id.* at 333. The Court, however, found that none of these conditions was satisfied by North Carolina's intangibles tax. *Id.* at 333-44. North Carolina attempted to argue that the intangibles tax "compensates for the burden of the general corporate income tax paid by corporations doing business in North Carolina." *Id.* at 334. North Carolina further argued that one of the services supported through a general corporate income tax "is the maintenance of a capital market for corporations wishing to sell stock to North Carolina residents." *Id.* at 335. The Court found this argument to be "unconvincing." *Id.* Drawing on *Oregon Waste Systems*, the Court found the use of a tax on interstate commerce to compensate for general revenues to be an "expansive loophole." *Id.* (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 105 n.8 (1994)). The Court proceeded to reject the specific application of the intangibles tax because of doubts that North Carolina used the tax proceeds to maintain an intrastate capital market, and the state's failure to detail the proportion of the corporate income tax used to support the capital market, as well as a lack of equivalence between out-of-state corporations and resident shareholders. *Fulton*, 516 U.S. at 336-40.

Although *Fulton* will be relevant in our analysis of what expenses can be included in the "fisheries budget," it has no bearing on the basic allowability of fee differentials for nonresidents because commercial fishing licenses are not objects of interstate commerce. We held in *Carlson II* that "[u]nlike the fee differentials in *Oregon Waste Systems* and *Chemical Waste,*[73] the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits."[74] Consequently, we held that the negative or dormant Commerce Clause did not apply to the present case, but rather that the fee differentials were properly analyzed under the Privileges and Immunities Clause.[75] Nothing in *Fulton* causes us to abandon this position. The tax in *Fulton* was tied directly to whether the corporation in question engaged in interstate or intrastate commerce.[76] It was

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[73] *Chemical Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334 (1992).

[74] 919 P.2d at 1340.

[75] *Id.* at 1340-41. The Privileges and Immunities Clause does allow for nonresidents to be taxed on their business enterprises within a state. *See Shaffer v. Carter,* 252 U.S. 37, 52-53 (1920) ("That a state, consistently with the federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state.").

[76] *Fulton,* 516 U.S. at 327-28.

therefore clearly "predicated upon the movement of articles of commerce across state lines."[77] No similar situation exists here, with the fee differential for nonresident commercial fishers relating not to commerce but rather to the opportunity to utilize Alaska's natural resources. Consequently, *Fulton* does not provide a reason to revisit an issue decided in *Carlson II*.[78]

### 2. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*[79]

In *Camps Newfound,* the United States Supreme Court struck down a local Maine property tax exemption for a charitable camp that primarily served state

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[77] *Carlson II,* 919 P.2d at 1340.

[78] Even if we were to reach this issue, the fee differential would fall under the exception listed in *Fulton* whereby states can impose a facially discriminatory tax as long as it "make[s] interstate commerce bear a burden already borne by intrastate commerce." 516 U.S. at 331. We reached this conclusion in *Carlson I,* where we stated that "the state may equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference." 798 P.2d at 1278. We affirmed this decision in *Carlson II.* 919 P.2d at 1341-42. Furthermore, the fee differential satisfies the three-part test laid out in *Fulton*: (1) the fee differential is compensating for a clearly defined intrastate burden; (2) the fee differential is limited such that it does not exceed the burden borne by state residents; and (3) the event being taxed, namely the license to use state fisheries, is the same for residents and nonresidents. *See Fulton,* 516 U.S. at 333; *Carlson II,* 919 P.2d at 1342-44. Therefore, even if the fee differential were held to bear on interstate commerce, it would fall under one of the exceptions to the negative Commerce Clause.

[79] 520 U.S. 564 (1997).

residents.[80] A Maine town had attempted to argue that the business of the camp did not involve articles of commerce because the services of the camp were "delivered and 'consumed' entirely within Maine."[81] The Court noted that "[t]he attendance of these campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'"[82] We find there to be no direct analogy between the campers in *Camps Newfound* and the movement of commercial fishers into Alaska. The Court in *Camps Newfound* drew a comparison of the summer camps to hotels.[83] This comparison indicates a sufficient distinction from commercial fishing licenses and permits to allay concerns about the constitutionality of the fee differential.

The Court in *Camps Newfound* further compared the summer camps to a natural resource.[84] The Court pointed out that there is a long history of allowing residents and nonresidents alike equal access to natural resources in a state.[85] Quoting from *New England Power Co. v. New Hampshire,*[86] a case in which the Court struck down a New

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[80] *Id.* at 568-95.

[81] *Id.* at 572.

[82] *Id.* at 573.

[83] *Id.* at 573.

[84] *Id.* at 576-77; *see also Hughes v. Oklahoma,* 441 U.S. 322, 337-38 (1979) (striking down as violation of Commerce Clause Oklahoma law that placed no limits on number of minnows that could be caught and used within state but prohibited transportation of minnows out of state for sale because regulation of natural resources does not allow state to circumvent Commerce Clause).

[85] *Camps Newfound,* 520 U.S. at 576.

[86] 455 U.S. 331, 338 (1982).

Hampshire law attempting to place restrictions on a public utility's sales of hydroelectric energy generated in the state to out-of-state consumers, the Court stated that "[w]e have 'consistently . . . held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.'"[87] The Court considered the two situations analogous because in both cases "the burden fell on out-of-state access both to a natural resource, and to related services provided by state residents."[88] The Court explained that "[b]y encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent."[89]

The law in the present case, however, does not hinder or deny access to Alaska's natural resources, which in this case are the fisheries. Rather, the law merely allows the State to recoup from nonresidents the amount spent on maintaining the natural resource of the fisheries that it would be able to recover from nonresidents were they instead residents of Alaska. Nonresidents are being provided with equal access to the resource on the condition that they make a contribution to the maintenance of the resource equal to that made by state residents.[90] The

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[87] *Camps Newfound,* 520 U.S. at 576.

[88] *Id.* at 577.

[89] *Id.* at 578.

[90] *Oregon Waste Systems v. Department of Environmental Quality* specifically distinguishes the situation in that case, where a higher fee was charged for the disposal of out-of-state waste than for in-state

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situation in the present case can therefore be distinguished from that in *Camps Newfound.* Thus, there is no reason to revisit our decision in *Carlson II.*

### B. The Formula for Calculating the Allowable Fee Differential for Nonresident Commercial Fishing Fees

In *Carlson II,* we held the per capita formula advanced by the class to be, in comparison to the pro rata formula proposed by the State, "the correct method for calculating the contribution made by residents."[91] The formula calculates the per capita resident contribution to the cost of fisheries management, regardless of whether this person is a fisher, as follows: (Fisheries Budget/Alaska Population) X (percentage of State Budget from oil

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waste even though the cost of disposal of waste was the same no matter where the waste was generated, from a situation such as the present one where, absent a higher nonresident fee, the use of the fisheries and the cost of maintaining them imposes a higher cost on residents than on nonresidents. 511 U.S. 93, 101 (1994). Because the present case is properly analyzed as a Privileges and Immunities case, the primary concern is "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell,* 334 U.S. 385, 395 (1948). While nonresidents cannot be disadvantaged by their movement across state lines, there is nothing requiring that they benefit by such movement either. Nonresidents can therefore be required to compensate the state for the state resources they use. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 281 (1977) ("[T]he Court consistently has indicated that 'interstate commerce may be made to pay its way,' and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology."). The holding in *Carlson II* accomplishes this by limiting the fee differential to the per capita resident contribution. *Carlson II,* 919 P.2d at 1343.

[91] 919 P.2d at 1342.

revenues/1.0).[92] The figure determined by this formula for any given year is then compared to the actual fee differential charged. If the fee differential paid by the nonresident commercial fishers, i.e., the nonresident fee minus the resident fee for the same access, exceeds the resident contribution as calculated by the formula, then "the State will have failed to demonstrate that the means employed by its statute have a substantial enough relationship to the legitimate interest of the statute to survive Privileges and Immunities Clause review."[93]

It should be noted that the formula advanced by the class and adopted in *Carlson II* is not the only conceivable means for calculating an allowable fee differential for nonresidents. The United States Supreme Court requires only a "reasonable relation between the higher fees and the higher cost."[94] In *Carlson II,* we found the per capita

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[92] *Id.* at 1343.

[93] *Id.* at 1344.

[94] *Mullaney v. Anderson,* 342 U.S. 415, 418 (1952). It is worth noting in passing that a multitude of other states allow nonresident commercial fishers to be charged higher fees than resident commercial fishers without any apparent reliance upon a formula to calculate the allowable fee differential. Delaware charges $150 for a resident commercial food fishing license and $1,500 for a comparable nonresident license. DEL. CODE ANN. tit. 7, § 914 (2001). Florida requires residents to pay $50 for a saltwater products license for an individual and $100 for a boat. Nonresidents are required to pay twice these amounts. FLA. STAT. 370.06(2)(a) (West 2001). Georgia charges $12 for a resident commercial fishing or crabbing license and $118 for a nonresident fishing or crabbing license. GA. CODE § 27-2-23 (2001). Maine establishes a fee of $89 for a commercial fishing license for a resident operator and all crewmembers and $334 for a commercial fishing license for a nonresident operator and all crewmembers. ME.REV.STAT. ANN. tit. 12, § 6501 (West 2001). Michigan charges nonresidents five times the amount charged a resident for the same license. Mich. Comp.

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formula advanced by the class to be an acceptable method for calculating the resident contribution to fisheries management and hence the allowable nonresident fee differential.[95] We continue to uphold the applicability of this formula.

We should clarify, however, that a refund will only be necessary if the difference between the actual fees charged to resident and nonresident commercial fishers is substantially in excess of the allowable fee differential indicated by the formula, such that the actual fees do not bear a reasonable relationship to costs not otherwise paid by nonresidents.[96] We leave to the superior court on remand

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LAWS ANN. § 324.47330 (West 2001). For commercial eel fishing licenses New Jersey charges nonresidents the greater of the New Jersey fee or the amount that the nonresident would pay in their state of residence. N.J. STAT. ANN. § 23:3-72 (West 2001). In Oregon, a resident commercial fishing license costs $50 and a nonresident commercial fishing license costs $100. OR.REV.STAT. § 508.285(d), (e) (2001). South Carolina charges nonresidents five times the amount it charges residents for a variety of commercial equipment licenses. S.C. CODE ANN. § 50-5-325 (Law Co-op 2001). Texas charges nonresidents $100 for a general commercial fisherman's license as compared to $15 for residents and $125 as compared to $65 for a commercial finfish fisherman's license. TEX. PARKS AND WILD.CODE ANN. § 47.002-03 (Vernon 2001).

[95] 919 P.2d at 1342-43.

[96] *See Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) ("[A]s a practical matter, the Privileges and Immunities Clause affords no assurance of precise equality in taxation between residents and nonresidents of a particular State. Some differences may be inherent in any taxing scheme, given that, '[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute,' and that '[a]bsolute equality is impracticable in taxation.' Because state legislatures must draw some distinctions in light of 'local needs,' they have considerable discretion in formulating tax policy. Thus, 'where the question is whether a state taxing law contravenes rights secured by [the federal Constitution], the decision must depend

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to determine whether proportionality exists in any particular instance and whether a refund is due. These determinations are subject to review using an abuse of discretion standard.[97]

### 1. Components of the fisheries budget

The findings of fact and conclusions of law by the superior court describe the fisheries budget as being comprised of the State's "direct operating expenditures" and the State's "indirect operating expenditures." The State in its pre-trial brief contended that the fisheries budget consists of six components: "(1) direct operating expenditures; (2) indirect operating expenditures; (3) general government expenditures; (4) capital costs; (5) hatchery loan fund subsidy; and (6) foregone revenues from fishery resources." Judge Michalski only accepted the first two of these items.

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not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.'" (citations omitted)); *Maxwell v. Bugbee,* 250 U.S. 525, 543 (1919) ("[I]nequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."); *see also Shaffer v. Carter,* 252 U.S. 37, 55 (1920) ("[W]here the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."); *Travelers' Ins. Co. v. Connecticut,* 185 U.S. 364, 371 (1902) ("It is enough that the state has secured a reasonably[ ] fair distribution of burdens, and that no intentional discrimination has been made against nonresidents.").

[97] *See Breck v. Moore,* 910 P.2d 599, 606 (Alaska 1996) ("This court reviews an award of damages for an abuse of discretion and independently reviews the law applied by the trial court.").

The concept of a fisheries budget goes well beyond what any particular agency requests from the State. It is necessary, then, to determine what the State spends from its general funds on its commercial fisheries. The record must support the belief that a rational relationship exists between the fee differential and the average cost of fisheries management to the resident.[98]

In determining the fisheries budget, Judge Michalski found that the figures the State provided for direct operating expenditures were justifiable and should be included in the final calculations. This figure totaled $126,099,100 for fiscal year 1996. Judge Michalski also held that indirect operating expenditures could be included in the fisheries budget as "based upon the federal formula for identifying indirect operating expenses[.]" The class does not challenge these indirect costs, which totaled $1,189,900 in fiscal year 1996.[99] Judge Michalski rejected the State's proposed inclusion of general government expenditures, capital costs, the hatchery loan fund, and forgone revenue from fisheries resources in the fisheries budget. The State challenges each of these exclusions.

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[98] *See Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993) ("[T]he record does not disclose that the Commonwealth of Virginia has shown that it created any credible method of allocating costs as between residents and nonresidents which places the burden equally or approximately equally upon residents and nonresidents.").

[99] The class at trial did raise some objections to the way in which the State calculated indirect expenditures, mostly having to do with a blurring of the line between direct and indirect expenditures. On its cross-appeal, the class seems satisfied with the stipulated indirect expenditures in the findings of fact. However, if the amount of direct fisheries expenditures is adjusted, the indirect expenditures will have to be adjusted accordingly.

The class challenged the list of fisheries expenditures provided by the State for direct operating expenditures as overly broad. The State sought to include in direct operating expenditures all those expenditures which go directly to support the commercial fishing industry as a whole. The *Carlson* cases hold that nonresidents can be made to pay for their share of the costs of fisheries management.[100] There is no precedent for determining if direct costs, indirect costs, general government expenditures, capital costs, the hatchery loan fund, and forgone revenue from fisheries resources in the fisheries budget are properly to be included in the expenses for fisheries management. Because this issue turns upon the legality of including different types of expenses in the budget for fisheries management, we decide the issue as a question of law.[101] Once the parameters of these budget components are established, the issue of calculating the exact amount of each component is a question of fact which is reviewed for clear error.

**a. Judge Michalski was not clearly erroneous in adopting the State's budget figures for direct and indirect costs.**

Judge Michalski held that both direct and indirect operating expenditures should be included in the fisheries budget. We agree with this conclusion. In *Carlson I,* we

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[100] *Carlson I,* 798 P.2d at 1278; *Carlson II,* 919 P.2d at 1342-43.

[101] *See Moody v. Delta Western, Inc.,* 38 P.3d 1139, 1140 (Alaska 2002) (holding that in question of law that is coming to court as case of first impression, de novo standard of review is applied).

stated that the State may "equalize the economic burden of fisheries management" by recovering from nonresidents the forgone revenues that residents pay for this expense.[102] The direct operating expenditures of fisheries management are implicitly included in this holding. The indirect operating expenditures are also contemplated by this holding because without the direct operating expenditures the indirect operating expenditures would not have been generated.[103]

The class does not challenge the general validity of either direct or indirect operating expenditures. Rather, it challenges the State's methodology for determining these figures by arguing that some of the amounts claimed by the State as direct operating expenses are not in fact directly associated with the costs of fisheries management.[104] However, following arguments by the parties on

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[102] *Carlson I*, 798 P.2d at 1278.

[103] *See State v. Northwestern Constr., Inc.*, 741 P.2d 235, 240 (Alaska 1987) (allowing inclusion of overhead costs in breach of contract suit against state).

[104] As the class notes, the State in *Carlson I* identified four sources as the "aggregate cost of fisheries management" – the annual operating budget of the Commercial Fisheries Entry Commission, 40.6% of the annual operating budget of the Department of Public Safety, the annual operating budget of the Division of Commercial Fisheries of the Department of Fish and Game, and the annual operating budget of the Fisheries Rehabilitation Enhancement and Development Division of the Department of Fish and Game. 798 P.2d at 1272. In *Carlson II*, the State similarly provided a chart in defense of its proposed pro rata formula listing "Expenditures By Four Agencies For Commercial Fishery Management." 919 P.2d at 1346. This chart goes from 1982 to 1989 and ranges from $29.0 million to $34.8 million; the amount in 1989 was $29.9 million. *Id.* The State presently seeks to include in the direct operating costs expenses beyond those limited to the four agencies it previously advanced. However, in the previous iterations of

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the appropriateness of the inclusion of different sub-components within the direct operating expenditures, Judge Michalski found that "the State's methodologies for valuing [direct and indirect operating expenditures] are appropriate." The class presents no persuasive argument on cross-appeal that this determination by the superior court is clearly erroneous. Judge Michalski agreed with the testimony by the State's expert witness that the disputed costs were directly related to the costs of fisheries management.[105] The testimony was sufficient to show that Judge Michalski was not clearly erroneous in his findings. Therefore, we affirm the findings of the superior court with regard to the methodology for determining direct and indirect operating expenditures and the corresponding calculations.

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this case, the State did not have the benefit of knowing the formula by which the allowable fee differential is to be calculated. Therefore, the State was justified in offering a different definition of the fisheries budget than the one under which it previously operated since this earlier definition had effectively been rendered moot. Judge Michalski was consequently not in error to hear arguments on this matter.

[105] For example, the second largest single expense for the direct operating costs is that of the "shared fish taxes." The class argues that these funds should not be counted as revenues because they are provided to local municipalities to defray fisheries-related impacts. The State responds that the revenue from the taxes goes to the general fund and is only then appropriated to municipalities. Judge Michalski did not rule explicitly on this issue. We hold that there is no difference between the shared fish taxes and other components of the fisheries budget. Judge Michalski accepted in whole the State's determination of the direct operating expenditures, which included the shared fish taxes. While testimony was offered that the taxes are essentially just a bookkeeping maneuver, it was not clearly erroneous for Judge Michalski to find them otherwise.

**b. General governmental expenditures cannot be included in the fisheries budget.**

The State argues that it should be able to include "general governmental expenditures," such as "corrections, health care, and education," in determining the fisheries budget because if these services were not provided "the commercial fishing industry would either be inefficient or could not exist." The State further argues that these figures are tied to population and economic growth in the sense that an increase in commercial fishing leads to an increase in population, which results in a corresponding growth in state expenditures on basic services.[106]

*Toomer v. Witsell,* a United States Supreme Court case on which the prior *Carlson* decisions rely, stated hypothetically that a fee differential allowing the State to recover conservation expenditures from taxes which only residents pay would be permissible.[107] *Carlson I* and *Carlson II* discussed allowing a fee differential to "equalize the economic burden of fisheries management."[108] Neither conservation expenditures nor fisheries management is as expansive as the general governmental expenditures that the State contends should be included in the fisheries budget. Judge Michalski noted that "the laws that relate

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[106] The State and the class disagree as to the admissibility of expert testimony on the issue of the inclusion or exclusion of general governmental expenditures in the total fisheries expenditures; this, however, is a question of law and thus does not turn on expert testimony. We therefore need not address their dispute.

[107] 334 U.S. 385, 399 (1948).

[108] *Carlson I,* 798 P.2d at 1278; *see also Carlson II,* 919 P.2d at 1342.

to a particular case or the laws of the state are not necessarily the same as the economic laws and the rules that apply to things." While in economic terms the State may bear much of the cost of government generated by the fishing industry, this does not translate into a legal justification for including these costs in the fisheries expenditures.

There is clear precedent against including the general costs of government in any fee differential for nonresidents as part of a compensatory tax scheme. Citing *Oregon Waste Systems, Fulton* noted "the danger of treating general revenue measures as relevant intrastate burdens for purposes of the compensatory tax doctrine."[109] And *Camps Newfound* described *Chemical Waste* as holding that "special fees assessed on nonresidents directly by the State when they attempt to use local services impose an impermissible burden on interstate commerce."[110] The Supreme Court, rejecting the State's claim that its surcharge on out-of-state garbage was compensatory in nature, stated in *Oregon Waste Systems* that

> permitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation "would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general

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[109] *Fulton Corp. v. Faulkner*, 516 U.S. 325, 335 (1996).

[110] *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 578 (1997) (citing *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)).

> state tax funds." We decline respondents' invitation to open such an expansive loophole in our carefully confined compensatory tax jurisprudence.[111]

Nonresident commercial fishers may be expected to reimburse the State for a share of the costs of fisheries management. But to include general governmental costs in the manner in which the State suggests would expand the scope of the fisheries budget beyond the bounds of constitutionality.

### c. Capital costs directly supporting the commercial fishing industry can be included in the fisheries budget.

The State claims that both those capital expenditures that directly support the commercial fishing industry and general capital expenditures driven by population growth should be included in the fisheries budget. Judge Michalski rejected the inclusion of all capital costs in the fisheries budget, and the State has appealed.

The general capital expenditures are rejected for the reasons given in the previous section. As for the capital expenditures directly related to the commercial fishing industry, such as for boat harbors and salmon hatcheries, those costs should be included in the fisheries budget to the extent that they are not already included in the direct

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[111] *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 105 n.8 (quoting *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992)).

operating expenditures. These direct capital expenditures are a clearly identifiable result of the costs of fisheries management and as such justify the contribution of nonresidents to their payment thereof. Because the superior court rejected outright the inclusion of all capital costs, no differentiation was made between general capital costs and those directly supporting the commercial fishing industry. Such a determination will be necessary upon remand. If these costs are already included in the direct operating expenditures, the State will not be allowed to count them twice.

**d. The hatchery loan fund subsidy should be included in the fisheries expenditures.**

The State operates a revolving loan fund to support investments in developing and operating fish hatcheries and other fish enhancement projects. The legislature created the Fishing Enhancement Revolving Loan Fund in 1977 to provide loans with favorable interest rates and repayment terms to private fishing corporations. By subtracting the present value of the future loan returns from the amount presently loaned, the State's expert was able to calculate what he considered a subsidy for the hatchery loan fund. However, testimony also was given that the funds collected in loan repayments do not go into the general fund but rather are used for new loans. Judge Michalski held that the supposed deficit incurred by the hatcheries loan fund was not a budgetary item "within the meaning of *Carlson II*" and thus could not be included in the fisheries expenditures for the purpose of determining nonresident contributions.

The State contends that the loan subsidy represents forgone revenues that the State could otherwise spend at present value. We agree. The hatcheries loan fund certainly benefits the commercial fishing industry. As such, it can be included in the costs of maintaining commercial fisheries. The State's expert at trial calculated the cost to the State attributed to the hatcheries loan fund to be approximately $2.3 million for 1996. Because there appears to be some confusion as to whether the State is presently transferring any funds to the hatcheries loan fund and because the superior court did not make a ruling on what this amount would be, we remand on this issue for a determination of the yearly amount expended by the State to support this program. As with the capital costs, the expenditure for the hatcheries loan fund must not already have been included in the direct operating expenditures.

**e. Forgone revenues from commercial fishery resources cannot be included in the fisheries expenditures.**

The State argues that because Alaska has the authority to manage its fish resources and could manage them in a way that is more profitable than the current method of fish management, it incurs an opportunity cost that should be included in the fisheries expenditures. The State cites a District of Columbia Circuit case in which the court remanded for consideration of whether a city could include "the value [the City] could have obtained in the best

alternative use" in its calculation of the fair market value of the airfield land for the purpose of calculating user airplane landing fees.[112] That same court also held that opportunity costs can be used in setting utility rates.[113] Both of these property or energy rate value assessments, however, are fundamentally different from the State making a policy decision to allocate and utilize its resources in a particular way. The State has consciously chosen the manner in which it manages its fish, and has therefore decided to forgo any revenues that could be obtained from alternate forms of management. The State cannot recoup from nonresidents the possible revenue it forgoes in making policy decisions regarding its fisheries management. We therefore affirm the holding of Judge Michalski to exclude forgone revenues from the cost of commercial fisheries management.

### 2. What can be included in oil revenues?

The class argues that the trial court erred by including interest income deposited into state savings accounts as a part of oil revenues. The class contends that because nonresidents do not benefit from deposits into the permanent fund and the constitutional budget reserve, those amounts should not be included in the calculation of oil revenues. However, because the class proposes including deposits into the permanent fund and the constitutional budget reserve in the figure for the total state budget, by

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[112] *City of Los Angeles Dep't of Airports v. United States Dep't of Transp.*, 103 F.3d 1027, 1034 (D.C. Cir. 1997).

[113] *See Pa. Elec. Co. v. F.E.R.C.*, 11 F.3d 207, 209-10 (D.C. Cir. 1993).

which the oil revenues would be divided, its recommended calculation of the percentage of the state budget derived from oil revenues is clearly unworkable. One cannot exclude deposits into state savings accounts from the numerator of the formula determining the percentage of the state budget that is derived from oil revenues but include such deposits in the denominator, as this would inappropriately and dramatically reduce the percentage of the state budget derived from oil revenues.[114] Apples must be divided by apples, not oranges.

The class alternately proposes that investment earnings be removed from both the oil revenues and the total state budget expenditures by which the oil revenues are divided to determine the percentage of the budget funded by oil revenues. The class supports its position by noting that we have previously relied upon budget figures that included a variety of petroleum taxes, royalties, and rents, but not any interest income, in determining petroleum-related income.[115] Furthermore, the State, in its bi-yearly REVENUE SOURCE BOOK, uses this methodology in determining the percentage of unrestricted petroleum revenue as compared to unrestricted general funds.[116]

The State counters by arguing that because the source of the funds that generates the interest income is ultimately petroleum-derived, it should be included in the oil

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[114] The class approach yields a figure of 29.7%, far less than the 74% adopted by Judge Michalski.

[115] *Trustees for Alaska v. State, Dep't of Natural Res.*, 795 P.2d 805, 810 (Alaska 1990).

[116] This calculation yields the 86% figure previously relied upon by this court in *Trustees for Alaska*. 795 P.2d at 810.

revenues component. It should not matter, the State contends, how these funds are spent, only how they are derived, even if the expenditure of the funds is of no benefit to nonresidents. The State proceeds to demonstrate how the 74% figure was calculated by including the petroleum-derived revenues deposited in state savings accounts in both the numerator and denominator of the percentage of the state budget derived from oil revenues.

Judge Michalski accepted the State's methodology for calculating the percentage of the state budget derived from oil revenues, resulting in a figure of 74%. This calculation includes the interest income and permanent fund expenditures in both the numerator and the denominator. As with the basic formula for maximum allowable fee differential, there is no single correct method by which to calculate the percentage of the state budget derived from oil revenues. The key inquiry is that the methodology adopted bear a reasonable relationship to the figure to be calculated. The decision of the superior court to adopt the State's method of calculation is therefore reviewed for an abuse of discretion.[117] Because the State's methodology

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[117] *See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council,* 786 F.2d 1359, 1370 (9th Cir. 1986) ("The choice of methodology is a highly technical question which falls within the unique expertise of the Council. Unless an abuse of discretion is demonstrated, this court will not substitute its judgment on particular testing methodology."); *United States Steel Group-A Unit of USX Corp. v. United States,* 873 F. Supp. 673, 700 (Ct. Int'l Trade 1994) (holding that choice of methodology by trade commission was subject to review by abuse of discretion standard); *see also Dansereau v. Ulmer,* 955 P.2d 916, 919 (Alaska 1998) (holding that superior court did not abuse its discretion in adopting particular methodology to calculate number of hours litigants' attorneys worked for purpose of determining award of attorney's fees); *Gallant v. Gallant,* 882 P.2d 1252, 1257

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provides a reasonable means for calculating the percentage of the state budget derived from oil revenues, we find there to be no abuse of discretion and accordingly affirm the superior court.

### C. The State Has Previously Conceded that the Class Met the Protest Requirement.

The class filed suit on June 22, 1984, questioning the "legality of the State of Alaska's discriminatory fees for nonresident commercial fishing permits and licenses." The class on behalf of which the suit was filed was defined as "all persons who participated in one or more Alaska commercial fisheries at any time who paid nonresident assessments to [the] State for commercial or gear licenses or permits." On December 10, 1984, the State entered its nonopposition to certification of the case as a class action, though it did reserve the right to request that the class be divided into subclasses. On December 13, 1984, Superior Court Judge Milton M. Souter entered an order certifying the class. A later motion to decertify the class was denied by Judge Michalski on July 17, 1998. Judge Michalski held that the elements of numerosity, commonality, typicality, and adequacy of representation existed to justify continued certification of the class.

Alaska Statute 43.10.210(a) requires that in order for a refund to be given on an illegal tax, the tax must have been paid under protest. We held in *Carlson I* that a license was a tax within the meaning of the refund statute

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(Alaska 1994) (reviewing for abuse of discretion allocation of child support in novel case involving nonparental custody).

and that therefore the protest requirement applied to the class.[118] In *Principal Mutual Life Insurance Co. v. State, Division of Insurance,* we held that "[t]he protest requirement called for by AS 43.15.010(a)[119] serves . . . as proof that the payment of the tax in question was involuntarily made and it provides notice to the taxing authority that the tax is claimed to be illegal as well as the basis of the taxpayer's assertion."[120] A requirement of protest provides the state with notice of more than mere opposition to the tax – it provides the state with notice that it may soon be facing a lawsuit to recover the allegedly illegal amount. Once on notice, the state can budget accordingly to prepare for the possibility of losing at trial and being forced to refund the disputed amount.[121]

Judge Michalski held that the purpose of the notice requirement was met by the certification of the class action suit. The certification of a lawsuit over allegedly illegal taxes puts the state on notice that the taxes are being protested and that future tax recovery may be subject to being refunded. The State, however, argues that

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[118] 798 P.2d at 1280.

[119] The statute has subsequently been renumbered as AS 43.10.210(a).

[120] 780 P.2d 1023, 1030 (Alaska 1989).

[121] *Id.* at 1030-31 ("The burden of requiring a taxpayer to file a protest at the time of payment of the tax is at most minimal. On the other hand the requirement of a protest serves the important function of providing state government with notice of the claimed tax illegality, the grounds advanced in support of the claimed illegality, and affords the state the opportunity to fashion budget appropriations, or expenditures, taking into account the magnitude of the claimed tax illegality. We think these are significant considerations which warrant the retention of the requirement of a protest.").

notice of named plaintiffs does not translate into notice of the entire class of plaintiffs and that at the very least the class should not be entitled to retrospective relief.[122] Judge Michalski held that the expansive definition of the class as containing all fee-paying commercial fishers gave the state sufficient notice of the potential scope of the recovery. Judge Michalski further held that the certification of a class action suit obviated the need for individual protest by each class member, reasoning that "[r]equiring individual protest for each class member would do nothing to further inform the state. Instead, it would be merely an exercise in formality and technicality."

The State has long since conceded that, as to fees paid after June 22, 1984, the protest requirement was met by the filing of the class action suit and that sufficient notice had been given "for purposes of AS 43.10.210(a)." In its reply brief in the superior court, dated September 2, 1992, the State asserted:

> Plaintiffs are wrong when they assert that the State has conceded the right to a refund of any unconstitutional fees paid after the date plaintiffs filed their lawsuit. While this point is irrelevant to the issue immediately before the court, the State concedes only that the lawsuit serves as an adequate notice of protest for purposes of AS 43.10.210(a). In other words, all fees paid after June 22, 1984, by nonresident

[122] The State asserts that an early superior court argument created an estoppel argument against retroactive fees. The protest issue of this superior court opinion, however, was remanded for further inquiry in *Carlson I,* albeit without specifically addressing the estoppel argument alluded to by the superior court. 798 P.2d at 1280.

> commercial fishers who ultimately elect to join the class, in excess of fees paid by similarly situated resident commercial fishers, are deemed to have been paid under protest. The protest requirement of AS 43.10.210(a), however, is merely one precondition to the "[r]ecovery of overpayments and protested payments." [citing an earlier memorandum] The State does not concede that plaintiffs have satisfied any other procedural or substantive requirements that may apply.[123]

This admission that the protest requirement had been met is consistent with the State's earlier admissions that it was provided with sufficient notice. In an opposition to plaintiff's motion for a preliminary injunction, dated February 19, 1991, the State asserted that

> [w]ith regard to any nonresident differentials which have been received by the state since this class action was filed, the state views the lawsuit itself as a protest giving the state the contemplated notice. Thus, for any differentials received between now and the conclusion of this case, should any portion of those be determined to be invalid, plaintiffs can avail themselves of the statutory refund remedy identified by the supreme court to obtain damages.

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[123] This statement was given in a reply brief opposing waiver of the protest issue. The State made a similar statement on March 1, 1991 in a memorandum in support of a motion for summary judgment: "The state does not dispute here that the differential paid by nonresidents to engage in commercial fishing since the date that this class action was filed, June 22, 1984, have been paid under protest."

The State presently contends that prior to Judge Michalski's ruling in 1998 it had no reason to believe that it would be required to pay a refund and thus should not be required to pay a refund retrospectively all the way back to 1984. However, the purpose of the protest requirement, as stated above, is to give the state notice that it may eventually be required to pay a refund.[124] The fact that the litigation may take a long time to resolve and that the refund may thus grow increasingly large does not absolve the State of its eventual responsibility to pay. Thus, the only relevant question is whether the filing of a class action gives the State sufficient notice that every member of the class may be due a refund.[125] We agree with Judge Michalski that it does.

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[124] *See Principal Mutual Life Ins.*, 780 P.2d at 1030-31.

[125] The class argues that federal due process prevents the denial of retroactive tax recovery under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) ("To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.") (citations omitted). In *McKesson*, the United States Supreme Court ordered that a refund be given for an illegal tax even though Florida claimed this would cause the state serious economic injury. 496 U.S. at 51 n.35 ("We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds."). The class errs, however, when it invokes *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) (holding that federal remedy for unlawful tax applies not only to case at issue but also to parties in all other open cases). In the present

(Continued on following page)

The State cites *Era Aviation* in support of its claim that a separate protest must be attached to each separate complaint.[126] *Era Aviation* involved a suit by several air carriers to protest increased landing fees at rural airports.[127] After the original set of plaintiffs were granted summary judgment, a different set of air carriers tried to join the suit and recover fees retroactively.[128] We held that the second set of air carriers did not satisfy the necessary protest requirement at the time of the payment of the fees, even though they had stated their opposition to the landing fees on numerous occasions and even though the suit by the original set of air carriers put the state on notice that the fees might be illegal.[129] As the State is careful to point out, however, in *Era Aviation* we expressly declined to answer the question whether a class action suit would satisfy the protest requirement.[130] *Era Aviation* is thus not dispositive of the present situation.

In a further attempt to prove that the protest requirement would not be satisfied by a class action, the

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case, the class either exists as a whole or it does not exist at all for the purposes of the protest requirement. There are thus no other open cases to which a due process concern could apply.

[126] *Era Aviation, Inc. v. Campbell*, 915 P.2d 606, 609 (Alaska 1996) ("[U]nder common law as well as under statute, a protest at the time of payment is a prerequisite for an action to recover taxes.").

[127] *Id.* at 607. The original plaintiffs did not form a class.

[128] *Id.* at 607-08.

[129] *Id.* at 612.

[130] *Id.* at 612-13 (noting that state's ability to determine accurately its potential liability for fee refunds "would be undermined if a single lawsuit (which was not even a class action) were deemed sufficient notice to make all payers under the regulation eligible for refunds").

State cites a series of cases where class status has been denied for failure to satisfy the proper administrative procedures for protest.[131] These cases, however, are not applicable to the present case, where the class has already been certified. The present class satisfied the necessary procedural hurdles, and the State did not object to the certification of the class. Furthermore, the State, because it was the entity issuing the commercial fishing licenses and permits, had ample opportunity to keep records of those to whom these licenses and permits were being issued. It is therefore disingenuous for the State to claim that it was somehow caught unaware as to the ultimate size of the class or the potential recovery. For this reason, we affirm the holding of Judge Michalski that the protest and notice requirement was satisfied.

As to the date from which the fees can be measured, Judge Michalski selected December 13, 1984, which was the day the class was certified.[132] The class does not challenge the date of certification as the date from which fees can be measured. We therefore affirm December 13, 1984 as the date from which fees can be measured.

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[131] *Aronson v. City of Pittsburgh,* 510 A.2d 871, 873 (Pa. Commw. 1986); *Aronson v. Commonwealth,* 516 N.E.2d 137, 144 (Mass. 1987).

[132] The class action suit was filed on June 22, 1984. In *Carlson II,* we held that "the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210." 919 P.2d at 1344. As noted above, the State several times also stated that the protest requirement was met as of June 22, 1984. These prior statements, however, do not require us to reverse the decision of the superior court, which was not an abuse of discretion.

### 1. Named class members can sue for tax relief on behalf of unnamed class members.

Even if a class action suit constitutes notice, there is a separate question as to whether the named class members can sue on behalf of the unnamed class members without the unnamed class members themselves protesting the increased nonresident fees. Judge Michalski held that the class was to be treated as a unified legal entity and that therefore absent and non-protesting (i.e., unnamed) class members could not be excluded from the recovery of excess fees. This is consistent with both *Carlson I* and *Carlson II,* both of which speak of the class as a whole and neither of which mentions the possibility that only the named class members will be able to receive a refund.[133]

The State asserts that named class members should not be allowed to sue for unnamed class members because there are too many variables that determine exactly what each nonresident commercial fisher is to recover. Because individual interests in recovery are so unique, the State argues, only the individual taxpayers should be allowed to sue for their own recovery. The State also cites two cases where class status was denied to a taxpayer attempting to sue on behalf of a similarly situated taxpayer who had not protested the tax.[134]

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[133] *See Carlson I,* 798 P.2d at 1279-80; *Carlson II,* 919 P.2d at 1343-45.

[134] *Hooks v. Comptroller of Treasury,* 289 A.2d 332, 333-34 (Md. 1972); *Edisto Fleets, Inc. v. S.C. Tax Comm'n,* 182 S.E.2d 713, 714 (S.C. 1971).

These arguments would be appropriate in a motion to decertify the class, but the State lost on its bid to decertify the class and does not challenge that holding on appeal. Instead, the State attempts to circumvent the class certification issue by arguing that named class members cannot sue on behalf of unnamed class members. Yet, this is precisely the purpose of forming a class in the first place. Indeed, in *Nolan v. Sea Airmotive, Inc.*, we stated that one of the reasons for revising Alaska Civil Rule 23, the rule for establishing class actions, into its current form was "to end the 'perverse anomaly' by which there could 'be such a thing as a class action that did not run fully for or against the class.' "[135] Class action suits, in which the result for one becomes the result for many in the same legal predicament, are necessary to avoid a multiplicity of duplicative lawsuits.[136] Requiring that each nonresident commercial fisher file suit on his or her own behalf, which is what the State seems to be advocating, would produce exactly that result. Therefore, Judge Michalski's decision that named

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[135] 627 P.2d 1035, 1044 (Alaska 1981) (quoting Benjamin Kaplan, *"The Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure,"* 81 HARV. L. REV. 356, 386 (1967)). We therefore struck down a statutory requirement that an individual be named in a wage and hour suit in order for the statute of limitations to be tolled. 627 P.2d at 1046-47. The class correctly notes that AS 43.10.210 does not require prospective class members to opt into the class.

[136] *Nolan*, 627 P.2d at 1044 ("These policies implicate the questions of when joinder of parties and claims should be allowed, and the proper procedure for handling cases in which numerous parties or claims are involved. Absent an ability to provide for these matters by appropriate rules of procedure, it is possible that vast amounts of judicial, administrative, and private resources would be wasted.").

class members may sue on behalf of unnamed class members is affirmed.

### 2. The State's "sovereign immunity" defense cannot first be raised at this late date and was outside the scope of remand.

The State asserts that it "has not waived its sovereign immunity" from class actions for fee refunds. Although the State frames its argument in terms of sovereign immunity, it is not making a core sovereign immunity claim that the State is immune from suit on a particular claim or issue. Rather, the State appears to be arguing that based on its interpretation of the language of AS 43.10.210(a), plaintiffs are precluded from using one particular means of seeking a tax refund – a class action. Therefore, the State's argument addresses a question of statutory interpretation of the requirements of AS 43.10.210(a), an analysis which necessarily has some sovereign immunity overtones.

We reject the State's argument that it has not waived its "sovereign immunity" claim for two reasons. First, the State failed to raise this argument when the issue of the class's right to a refund was being litigated in the trial court and before us in the first appeal. Prior to the appeal leading to *Carlson I,* the class filed a cross-motion for partial summary judgment seeking a declaration, in principle, that the class was entitled to a refund. The State opposed this cross-motion on several grounds, but not on the ground that AS 43.10.210(a) did not allow refund class actions. After the trial court declined to grant the class's motion, the class appealed the court's refusal to rule that the class was entitled to a refund. Again, the State did not defend on the basis that the statute did not allow class

actions for refund claims. We agreed with the class in *Carlson I* that in principle it would be entitled to a refund if there were unconstitutional discrimination, subject to the condition that the statutory protest requirement had to be either satisfied or waived.[137] Thus, in *Carlson I,* the class prevailed on its argument that it was entitled to a refund if unconstitutional discrimination were found. The State's failure to raise its immunity argument before the superior court and before this court at the time this issue was being litigated precludes the State from raising this defense now.[138]

Second, the State's defense is outside the scope of *Carlson II's* remand. The State maintains that its argument was properly raised because it falls within *Carlson II's* remand order that the superior court "decide whether the filing of this suit constituted notice sufficient to comply with the protest requirement of AS 43.10.210(a)[.]"[139] The State's argument, however, does not address the adequacy of notice or protest. Rather, what the State argues is that the word "taxpayer" in AS 43.10.210(a) does not include a class and that therefore the statute does not permit a class to sue for a tax refund. "When an appellate court issues a specific mandate a trial court has no authority to deviate from it."[140] The State's defense could not have fallen within

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[137] *Carlson I,* 798 P.2d at 1279-80.

[138] *Cf. Univ. of Alaska v. Simpson Bldg. Supply Co.,* 530 P.2d 1317, 1323-24 (Alaska 1975).

[139] *Carlson II,* 919 P.2d at 1344.

[140] *Gaudiane v. Lundgren,* 754 P.2d 742, 744 (Alaska 1988) (citing *King v. Alaska State Hous. Auth.,* 571 P.2d 1010, 1011-12 (Alaska 1977)).

the scope of *Carlson II's* remand because the State did not argue it before the trial court prior to the final judgment that led to *Carlson II,* nor did the State appeal on this ground in *Carlson II.*

Successive appeals should narrow the issues in a case, not expand them.[141] Other jurisdictions have explicitly ruled that all matters that were or might have been determined in a former appeal may not be presented in a subsequent appeal of the same case.[142] The basis for this rule is that "[j]udicial economy and the parties' interests in the finality of judgments are in no way furthered if parties are allowed to engage in piecemeal appeals."[143] We have expressed a similar rule in the context of res judicata,

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[141] *Cf. Watts v. Seward Sch. Bd.,* 421 P.2d 586, 618 (Alaska 1966) (Rabinowitz, J., dissenting in part and concurring in part), *vacated,* 391 U.S. 592 (1968) (explaining that law of the case doctrine, which prohibits reconsideration of issues that have been explicitly or inherently adjudicated in previous appeal, promotes judicial economy by "narrowing down the issues in successive stages of litigation"); *Hudson v. Wakefield,* 711 S.W.2d 628, 630 (Tex. 1986) ("By narrowing the issues in successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency.").

[142] *E.g., MacKay v. Hardy,* 973 P.2d 941, 947 (Utah 1998); *Penrich, Inc. v. Sullivan,* 669 A.2d 1363, 1367 (N.H. 1995); *Hartford Nat'l Bank & Trust Co. v. Tucker,* 487 A.2d 528, 530 (Conn. 1985); *First Am. Nat'l Bank v. Booth,* 606 S.W.2d 70, 71 (Ark. 1980); *Kazubowski v. Kazubowski,* 259 N.E.2d 282, 288 (Ill. 1970); *E.F. Prichard Co. v. Heidelberg Brewing Co.,* 234 S.W.2d 486, 487-88 (Ky. 1950); *Montgomery v. Trisler,* 771 N.E.2d 1234, 1239 (Ind. App. 2002); *Bike Fashion Corp. v. Kramer,* 46 P.3d 431, 436 (Ariz. App. 2002); *Baker v. Nat'l State Bank,* 801 A.2d 1158, 1167 (N.J. Super. A.D. 2002).

[143] *MacKay,* 973 P.2d at 947. *See also First Am. Nat'l Bank,* 606 S.W.2d at 71; *Kazubowski,* 259 N.E.2d at 288; *Bike Fashion Corp.,* 46 P.3d at 436.

which involves subsequent suits rather than subsequent appeals.[144] Because it could have been raised in earlier appeals but was not, and because it therefore falls outside the scope of our specific remand in *Carlson II,* we decline to address the State's "sovereign immunity" defense that AS 43.10.210(a) does not permit class actions for fee refunds.

To the extent that the State is arguing that sovereign immunity bars class actions in which the class includes taxpayers who have not met the administrative prerequisite of providing notice via protest, we have already addressed the issues of protest, notice, and division of the class in this opinion. Because the State conceded notice and protest, there was no need for the trial court to address the "sovereign immunity" defense in considering these arguments. Moreover, we have already upheld in this opinion the superior court's treatment of the class as a unified legal entity. Accordingly, we need not address the State's argument in the context of absent class members' refund claims.

### D. The Class May Recover Prejudgment Interest on Any Refund that May Be Due.

In *Carlson II,* we directed the superior court to determine on remand whether prejudgment interest is due under AS 45.45.010.[145] As the superior court correctly noted, AS 45.45.010 "merely sets the maximum rate of

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[144] *Robertson v. Am. Mech., Inc.,* 54 P.3d 777, 780 (Alaska 2002); *Sengupta v. University of Alaska,* 21 P.3d 1240, 1254 (Alaska 2001).

[145] 919 P.2d at 1344.

interest that may be charged." Consequently, the superior court looked to related statutory provisions to address the prejudgment interest issue. The superior court concluded that because *Carlson I* applied Title 43 as it relates to the allowable statute of limitations,[146] Title 43 should also apply to the question of prejudgment interest. The superior court reasoned that because AS 43.05.280 allows for prejudgment interest for an overpayment of taxes, prejudgment interest should be allowed in the present case.

The State argues that while prejudgment interest is allowed for taxes derived under Title 43, it is not allowed for taxes derived under Title 16, which is the title authorizing the commercial fishing fees. Noting again the importance of construing waivers of sovereign immunity strictly, the State proceeds to discuss a wide range of cases holding that waivers of sovereign immunity imposing monetary liability on the federal or state government must be narrowly interpreted.[147] We have expressed similar sentiments, holding that "only the legislature has the power to direct the assessment of interest against the sovereign"[148] and that "except where the constitution directs otherwise, interest may not be assessed against the State except

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[146] *See* 798 P.2d at 1280.

[147] *See, e.g., Library of Cong. v. Shaw,* 478 U.S. 310, 311 (1986) ("The no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest."), *superseded by statute on other grounds as stated in Landgraf v. USI Film Products,* 511 U.S. 244, 251 (1994).

[148] *Stewart & Grindle, Inc. v. State,* 524 P.2d 1242, 1245 (Alaska 1974).

where interest is specifically authorized by the legislature."[149] However, we have also held that "it would be unduly technical to deny [a claimant bringing suit against the state] interest based on a mere matter of form."[150] Furthermore, the Ninth Circuit allowed prejudgment interest under the territorial predecessor to AS 43.10.210(a).[151]

The introductory language of AS 43.05.275, applied to the present case in *Carlson I*,[152] is fundamentally the same as the introductory language at issue here in AS 43.05.280 in that both apply to a tax under this title. It is hard to imagine applying section .275 and not section .280 to the present case even if one interprets the latter more strictly than the former. Alaska Statute 43.05.280 applies to all overpayment of taxes under Title 43.[153] This statutory section should therefore apply to the provisions for recovery of overpayments laid out in AS 43.10.210. Because AS 43.05.280 serves as the primary justification for providing the class with a refund, the prejudgment interest available under AS 43.10.210 in other actions extends to the recovery of prejudgment interest for overpayment of commercial

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[149] *Danco Exploration, Inc. v. State, Dep't of Natural Res.*, 924 P.2d 432, 434 (Alaska 1996).

[150] *Id.*

[151] *Mullaney v. Hess*, 189 F.2d 417, 420 (9th Cir. 1951).

[152] 798 P.2d at 1280.

[153] AS 43.05.280(a) provides: "Interest shall be allowed and paid on an overpayment of a tax under this title at the rate and in the manner provided in AS 43.05.225(1)."

fishing fees, even though these are ostensibly created under Title 16.[154]

## V. CONCLUSION

We have previously addressed the constitutionality of charging nonresidents more than residents for commercial fishing licenses and entry permits. The class has failed to present any valid arguments as to why we should reconsider this position. We therefore AFFIRM the formula adopted in *Carlson II* for calculating the maximum allowable fee differential for nonresidents. We further AFFIRM the holding of the superior court adopting the State's methodology for calculating direct and indirect costs associated with fisheries management. We AFFIRM the exclusion of general government expenditures and forgone revenues from fishing, but we REVERSE and REMAND on the issue of the hatcheries loan fund subsidy, and we partially REMAND on the issue of capital costs. We conclude that the State has waived its objection to the protest and notice requirement of AS 43.10.210(a), as well as a related sovereign immunity claim. We AFFIRM the decision of Judge Michalski that the refund applies to unnamed class members. Finally, we hold that the class may recover prejudgment interest if it obtains a refund on remand.

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[154] We are not here ruling on whether the class will be due a refund upon remand. Rather, we are only stating that if upon remand it is determined that a refund is due, prejudgment interest can be obtained on that refund.

**Sec. 16.43.160. Fees.** (a) The commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits.

(b) *[Repealed, § 7 ch 27 SLA 2001.]*

(c) *[Repealed, § 7 ch 27 SLA 2001.]*

(d) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue.

(e) For an entry permit or an interim-use permit issued for calendar year 2002 and following years, the annual base fee may not be less than $10 or more than $300. The annual base fee must reasonably reflect the different rates of economic return for different fisheries. The fee for a nonresident entry permit or a nonresident interim-use permit shall be higher than the annual base fee by an amount, established by the commission by regulation, that is as close as is practicable to the maximum allowed by law. The amount of the fee for a nonresident entry permit or a nonresident interim-use permit may reflect.

(1) the costs incurred by the state that are directly attributable to participation of nonresidents in the commercial fisheries of the state;

(2) the costs incurred by the state for

(A) direct operating expenditures for ongoing management, support, and regulation of the commercial fishing industry, including relevant expenditures of the

(i) Office of the Governor – Alaska coastal management program;

(ii) Department of Environmental Conservation – air and water quality permitting activities and seafood inspection activities;

(iii) Department of Community and Economic Development – commercial fishing loan program, Alaska Seafood Marketing Institute, and community development quota program;

(iv) Department of Fish and Game – division of commercial fisheries, division of habitat and restoration, board support section, division of administrative services, division of sport fish, commissioner's office, and Alaska Commercial Fisheries Entry Commission;

(v) Department of Labor – Wage and hour enforcement, mechanical inspections, occupational safety and health activities, and fishermen's fund;

(vi) Department of Law;

(vii) Department of Natural Resources;

(viii) Department of Public Safety – commercial fisheries enforcement;

(ix) Department of Revenue – fisheries business tax program, fishery resource landing tax program, salmon enhancement tax program, salmon marketing tax program, and dive fishery management assessment program;

(x) University of Alaska – Fisheries Industrial Technology Center, Institute of Marine Science, Marine Advisory Program, Sea Grant College Program, and School of fisheries and Ocean Sciences;

(xi) Legislature;

(xii) Alaska Court System;

(B) indirect operating expenditures for general overhead attributable to supporting the commercial fishing industry, including expenditures for general overhead attributable to components of agencies that have direct operating expenditures identified under (a) of this paragraph and to components of agencies for which direct operating expenditures related to the ongoing management, support, and regulation of the commercial fishing industry cannot be readily determined;

(C) general government expenditures for government services that are used by a portion of the population attributable to the presence of the commercial fishing industry, including government services provided by the Department of Administration, Department of Corrections, Department of Education and Early Development, Department of Health and Social Services, Department of Military and Veterans' Affairs, and Department of Transportation and Public Facilities;

(D) capital expenditures to support the commercial fishing industry as measured by annual depreciation of public facilities and infrastructure; and

(E) expenditures to subsidize the construction and operation of salmon hatcheries; and

(3) the amount of revenue foregone by the state due to the current management system for commercial fisheries in the state.

(f) For an entry permit or an interim-use permit issued for calendar year 2002 and following years, the holder of a permit whose household income, assets, and financial resources fall within the eligibility standards for

the food stamp program under 7 U.S.C. 2011-2025, as amended, is subject to a maximum annual fee that is equal to 50 percent of the fee that the permit holder would otherwise pay under (e) of this section. (§ 1 ch 79 SLA 1973; am § 15 ch 105 SLA 1977; am § 4 ch 123 SLA 1978; am § 2 ch 79 SLA 1982; am §§ 3, 4 ch 22 SLA 1985; am §§ 4, 5, 7 ch 27 SLA 2001; am § 5 ch 20 SLA 2002)

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**20 AAC 05.245. Schedule of annual fees.** (a) The commission will determine, on a yearly basis, the annual fee for the issuance or renewal of an entry permit or interim-use permit according to the following:

(1) the annual base fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is four-tenths of one percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection; if insufficient data are available to determine the estimated value of an entry permit, the annual fee in a limited fishery will be calculated according to (2) or (3) of this subsection;

(2) the annual base fee for the issuance or renewal of an interim-use permit in an unlimited fishery is four-tenths of one percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection;

(3) notwithstanding (2) of this subsection, the commission may make an appropriate adjustment to a fee if more than one permit type allows the directed harvest of the same species

with the same gear in the same area or if one permit allows the directed harvest of the same species by a combination of gears in the same area; if strict application of (1) and (2) of this subsection results in a fee that exceeds the level appropriate in light of the rate of economic return for the fisheries covered by that permit, the commission may reduce the fee;

(4) the annual base fee are as follows:

| FEE CLASS | ANNUAL BASE FEE |
|---|---|
| 1 | $300 |
| 2 | $240 |
| 3 | $180 |
| 4 | $120 |
| 5 | $60 |

(5) under (1) of this subsection, the entry permit value for each fishery will be estimated by the commission in June of the year immediately preceding the year for which the annual base fee applies;

(6) under (2) and (3) of this subsection, the average gross earnings for each fishery will be estimated by the commission in June of the year immediately preceding the year for which the annual base fee applies; these estimates will be based upon the most recent three years for which data are available; if less than three years of data are available for a fishery, the average will be calculated using the available years;

(7) if the person seeking the issuance or renewal of an entry permit is not a resident of this state, the commission will determine the fee for an interim-use or entry permit to be the annual

base fee as calculated under (1)-(6) of this subsection plus an additional amount as calculated under this paragraph; once every three years, the commission will obtain from the Office of the Governor, Office of Management and Budget (OMB), the values necessary to calculate the maximum allowable annual fee differentials under the per capita formula established by *Carlson v. State*, 919 P.2d 1337, 1342-45 (Alaska 1996); to determine the additional amount, the commission will calculate an average of the maximum allowable fee differentials in the five most recent fiscal years for which OMB has provided values, and will round the calculated average to the nearest five dollars; the commission will recalculate the additional amount every three years.

(b) Unless fishery resources, gear, or administrative areas are combined under this chapter, and except as provided in 20 AAC 05.120, a separate permit is required for each separate fishery resource, gear, and administrative area.

(c) A resident of this state may apply for a reduced fee for the issuance of an interim-use permit or the annual renewal of an interim-use or entry permit if the resident's total family income, as defined for the food stamp program in 7 C.F.R. 273.9-273.11, as revised as of January 1, 2002 and adopted by reference, falls within the poverty guidelines published by the United States Department of Health and Human Services, in the Federal Register on February 14, 2002 and adopted by reference, and the resident's assets and resources do not exceed those established for the food stamp program in 7 C.F.R. 273.8, as revised as of January 1, 2002 and adopted by reference. The reduced fee for a resident entry or interim-use permit

is 50 percent of the annual base fee determined under (a)(1)-(6) of this section.

(d) A nonresident may apply for a reduced fee for the issuance of an interim-use permit or the annual renewal of an interim-use or entry permit if the nonresident's total family income, as defined for the food stamp program in 7 C.F.R. 273.9-273.11, as revised as of January 1, 2002 and adopted by reference, falls within the poverty guidelines published by the United States Department of Health and Human Services, in the Federal Register on February 14, 2002 and adopted by reference, and the nonresident's assets and resources do not exceed those established for the food stamp program in 7 C.F.R. 273.8, as revised as of January 1, 2002 and adopted by reference. The reduced fee for a nonresident entry or interim-use permit is 50 percent of the total fee determined under (a)(7) of this section.

(e) An applicant for a reduced fee under (c) or (d) of this section must apply on the 2003 Poverty Guidelines and Reduced Permit Fee Application, provided by the commission, as revised as of August 2002 and adopted by reference, and must provide the documentation identified on that form. (Eff. 10/27/2001, Register 160; am 5/16/2002, Register 162; am 12/21/2002, Register 164)

Supreme Court, U.S.
FILED
SEP 2 2 2003
OFFICE OF THE CLERK

No. 03-73

IN THE

# Supreme Court of the United States

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, AND LYLA C. WEESE, INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

*Petitioners,*

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Alaska**

## REPLY FOR PETITIONERS

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## REPLY FOR THE PETITIONER

The State of Alaska does not dispute Petitioners' showing (Pet. 11-26) that the decision below raises important and far-reaching questions about the constitutionality of the Alaska commercial-fishing-license-fee scheme, which provides a naked preference to local *commercial* fishermen who seek to fish in Alaska's bountiful waters. Instead, the State (i) urges that the constitutional rulings are insufficiently final to be reviewed (despite the Alaska Supreme Court's unequivocal statements that these constitutional questions have been "addressed" and "reaffirmed," and would not be "revisit[ed]," Pet. App. 14a, 24a); (ii) endorses the Alaska court's rulings that the Commerce Clause has no application whatsoever to a fee admittedly imposed, disproportionately, on out-of-state *commercial* fishermen; and (iii) proclaims that the Alaska court properly devised a formula for calculating a constitutionally permissible fee differential based on fisheries-related expenditures from state oil revenues "attributable" to state residents. The State is wrong on every count.

1. **The constitutional questions presented are final.** Alaska suggests (Opp. 8) that the constitutional rulings made by the Alaska court do not reflect a "final judgment" under 28 U.S.C. § 1257, because *Carlson III* "did not finally rule on the ultimate question the case raises—the constitutionality of the state's resident-nonresident fee differential." Unqualified language in the Alaska court's opinion directly contradicts the State's position: "The constitutionality of charging nonresidents more for commercial fishing licenses and permits has already been addressed, first in *Carlson I* and then reaffirmed in *Carlson II*." Pet. App. 14a. And, despite Petitioners' efforts to convince the Alaska Supreme Court of its prior errors, the court in *Carlson III* found "no reason to revisit [the] decision in *Carlson II*." Pet. App. 24a. It would be remarkable indeed if the Alaska Supreme Court had not reached a final decision on these constitutional issues

after nearly 20 years of litigation and *three* opportunities for review by that court.

All that is left for the state trial court is the calculation of damages. *See* Pet. App. 25a-26a ("We leave to the superior court on remand to determine whether proportionality exists in any particular instance and whether a refund is due."). Contrary to Alaska's suggestion (Opp. 10), that refund calculation will have no bearing on the constitutional questions presented by the petition: Even if application of the *Carlson II* formula were to result in a finding that the fee differential was unconstitutional in part under the Privileges and Immunities Clause (and that a refund was due the class members), Petitioners' claims that the fee differential should be invalidated altogether under the Commerce Clause, and that the Alaska court's formula for determining compliance with the Privileges and Immunities Clause is constitutionally flawed, would remain. Thus, this is a case "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975); *see also, e.g.*, *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945).

2. **Whether the Commerce Clause applies to the Alaska commercial-fishing-license scheme warrants this Court's review.** Petitioners showed (Pet. 11-17) that there is no justifiable basis for the Alaska court's holding that discriminatory fees for commercial fishing licenses issued to out-of-state fishermen are not limited by the Interstate Commerce Clause. The State nonetheless defends the Alaska court's judgment by drawing an artificial and untenable line between "the selling of fish" on the one hand, which the State concedes is restricted by the Commerce Clause, and the harvesting of fish by commercial fishermen in Alaska's waters—which the State says does not even implicate the Commerce Clause (Opp. 11), despite the fact that out-of-state fishermen cannot engage in that activity absent the payment of a discriminatory surcharge.

The State's position strains credulity: For one, it is difficult to imagine a nonresident commercial fisherman whose commercial endeavors are unaffected by Alaska's requirement that he pay a significantly higher fishing license fee than his in-state competitors simply because he is a nonresident. Indeed, the brief submitted by *amicus curiae* The Tangier Sound Waterman's Association makes clear that discriminatory nonresident surcharges like Alaska's "are a common burden and often a total barrier for [nonresident] commercial fishermen." *Amicus* Br. at 3.

For another, the State's argument (Opp. 13-14) that the Commerce Clause does not apply until the fish are removed from the ocean is, like the Alaska court's ruling, based on discredited precedent. The State fails to address Petitioners' showing (Pet. 13) that the Alaska court's repeated reliance (Pet. App. 103 n.4; *see also* Pet. App. 60a n.8) upon the statement in *Toomer v. Witsell*, 334 U.S. 385, 394-95 (1948), that the Commerce Clause is not violated when "the taxable event . . . occurs before the [article] can be said to have entered the flow of interstate commerce," is no longer good law, because the authorities it relied upon to reach that holding "ha[ve] been undermined by more recent cases." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614 (1981). Instead, the State leans on language in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), a case involving shrimping in Louisiana, for the proposition that "the protection of the commerce clause attaches at the time of the taking" and not until then. *Id.* at 13. But that proposition—expressed only slightly differently than in *Toomer*—was interred by *Commonwealth Edison*, as explained in the petition (Pet. at 13). Nor is the Opposition's reliance on the dissent in *Geer v. Connecticut,* 161 U.S. 519 (1896), availing. *Hughes v. Oklahoma*, 441 U.S. 322 (1979), overruled *Geer* and laid to rest the fiction that the state owns the natural resources within its borders in its sovereign capacity, and thus can condition the possession of wildlife on its remaining within the state. *Id.* at 327. *Hughes*' approval

of the dissent in *Geer* extended only to the proposition that the state could not limit interstate commerce in a natural resource *even after it had been reduced to possession*. *Id.* at 329. The question whether the Commerce Clause applies to a natural resource found within the state *before* its reduction to possession was not at issue in *Geer*; that question was answered in the affirmative by *Commonwealth Edison,* as even the State appears to recognize (Opp. 15).

Most fundamentally, though, the State's argument simply misconstrues Petitioners' Commerce Clause claim—the "commerce" involved here is *fishing*, not fish, and the Commerce Clause protects the interstate provision of both "goods" like fish, and "services" like fishing. The Court has "long noted the applicability of [its] dormant Commerce Clause jurisprudence to service industries." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 577 n.10 (1997) (citing cases); *see also, e.g., C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391 (1994) ("the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it"). The Commerce Clause is applicable to the Alaska license-fee scheme not because "nonresident fishers *eventually* engage in commercial activity" by selling harvested fish (Opp. 13), but because the activity of fishing is itself an interstate commercial activity: Nonresident fishers cross state lines to pursue a commercial activity in Alaska, and that interstate movement in pursuit of commercial ends renders the Commerce Clause fully applicable—and highly relevant—to the Alaska license-fee scheme. *Compare Camps Newfound/Owatonna*, 520 U.S. at 573 (interstate movement of out-of-state campers who sought to attend Maine charitable camp constitutes commerce); *Edwards v. California*, 314 U.S. 160, 172 (1941) ("[I]t is settled beyond question that the transportation of persons is 'commerce' within the meaning" of the Commerce Clause). The movement of nonresident commercial fishermen into Alaska to harvest fish is at least as "commercial" as the movement

of nonresident campers attending Camps Newfound/Owatonna into Maine.

That said, the State does not even address the central question presented by the petition—whether discrimination based on residency is cognizable under the Privileges and Immunities Clause alone, and not the Commerce Clause, as the Alaska court held. Pet. App. 62a-63a. Petitioners showed (Pet. 16) that this Court has already suggested, just last Term, that a challenge by nonresidents to California's milk pricing and pooling regulations is cognizable under *both* Clauses. *Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142 (2003). The State does not even mention *Hillside Dairy*, much less try to distinguish it, and it cites no authority for the remarkable proposition that a state law that discriminates against nonresidents who seek to engage in commerce within the state implicates only the Privileges and Immunities Clause.

Alaska similarly fails to address the implications of the Alaska court's ruling for out-of-state corporations that purchase commercial fishing licenses on behalf of employees. *See* Pet. 17. Because the Privileges and Immunities Clause provides no protection against discrimination for corporations, *see Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-82 (1868), *overruled in part on other grounds*, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Alaska Supreme Court's holding would leave nonresident corporations constitutionally defenseless against patent local protectionism. The State's inability to answer this question demonstrates both the constitutional error and the need for this Court's review.

3. **The Alaska Supreme Court's Privileges and Immunities Clause holding warrants this Court's review.** The Alaska Supreme Court's conclusion that a discriminatory fee can be justified under the Privileges and Immunities Clause so long as the discrimination satisfies a prolix mathematical formula—which in turn depends upon

an ongoing calculation of the State's budget generated by the State and given almost complete deference by the courts—flies in the face of established jurisprudence. This Court has repeatedly held that expenditures from a state's general revenues cannot be used to justify discrimination against nonresidents under the Commerce Clause. *See, e.g., Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 105 n.8 (1994); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 335 (1996).

The State does not dispute this principle; instead, it asserts that the rule of *Fulton Corp.* and *Oregon Waste Systems* is strictly confined to discriminatory taxes challenged under the Commerce Clause. A discriminatory fee analyzed under the Privileges and Immunities Clause, the State insists, is allowable so long as it does nothing more than equalize the burdens otherwise borne by state residents via expenditures from the state's (here, oil-derived) revenues, based on dictum (which the State erroneously describes as a "holding," Opp. at 15) in *Toomer*, 334 U.S. at 398-99. But the State offers no principled reason—much less any authority—for the rigid distinction it draws between the two Clauses, and it pays only lip service to this Court's longstanding recognition that the Clauses share a "common origin" and enjoy a "mutually reinforcing relationship." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). Nothing in the State's Opposition explains, or justifies, the Alaska court's decision to authorize a discriminatory fee under the Privileges and Immunities Clause that could not possibly survive scrutiny under this Court's "compensatory tax" Commerce Clause jurisprudence.

Here again, the State studiously avoids the significant issues raised by the petition, including the questions whether the Alaska Supreme Court overreached when it treated expenditures from the State's oil revenues as "analytically . . . equivalent" (Pet. App. 106a) to "taxes which only residents pay," *Toomer*, 334 U.S. at 399, *see* Pet. 22; whether the narrow category of enforcement and

conservation costs that the *Toomer* dictum suggested could be taken into account in assessing differential fees against nonresidents should be read so broadly as to include the generalized costs of state government encompassed by the *Carlson III* calculation of the State's fisheries budget, *see* Pet. 24-25; and whether the leeway given the State to calculate and submit for the court's exceedingly deferential review its own "fisheries budget" provides an open invitation to state governments to favor in-state commercial interests at the expense of out-of-state competitors, *see* Pet. 26. Alaska's refusal to confront these questions highlights rather than minimizes the need for this Court's intervention.

In a last-ditch effort to avoid review, the State claims (Opp. 19) that the nonresident differential should not be considered analogous to a tax, but rather is more akin to a "user fee" imposed by the State for access to the State's fishing waters. Even assuming that the Alaska license charge could be considered a "user fee," a theory not adopted by the Alaska Supreme Court, that would not save the Alaska scheme. For one, user fees *are* reviewable under the Commerce Clause. For another, this Court has repeatedly held that user fees are constitutionally permissible only so long as they are nondiscriminatory: "[E]ven if [a] surcharge could somehow be viewed as a user fee, it [cannot] be sustained [if] it discriminates against interstate commerce." *Oregon Waste,* 511 U.S. at 103-04 n.6. Even a case cited by the State (Opp. 19 nn.10 & 11), *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972), held that a one-dollar airplane boarding fee was allowable under the Commerce Clause only because the fee did not "discriminate[] against interstate commerce and travel": "both interstate and intrastate flights are subject to the same charges." *See also Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 290 (1987) (finding Pennsylvania marker fee and axle tax invalid in part because taxes "discriminate[d] against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the

State"). Because the Alaska fishing-license-fee scheme discriminates, on its face, against nonresidents, it cannot be sustained even under the rubric of a "user fee."

## CONCLUSION

For these reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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September 22, 2003

MOTION FILED
SEP 12 2003

(3)

No. 03-73

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DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, AND LYLA C. WEESE, INDIVIDUALLY AND AS A CLASS REPRESENTATIVES OF BEHALF OF ALL PERSONS SIMILARLY SITUATED,

*Petitioners,*

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of Alaska**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND A BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The Tangier Sound Waterman's Association (the "Association"), as *amicus curiae*, hereby respectfully requests leave to file the attached brief in support of the Petition for Certiorari.

The Association is an unincorporated group of approximately 80 commercial fishermen who live in

Maryland. The Association's members must pay a nonresident fee in order to fish in Virginia and thus they have been victims of the discriminatory burdens imposed by nonresident fishing fees, such as those in this case. In addition, the Association has long been concerned that states do not impede, through discriminatory regulations, the fundamental rights of fishermen to engage in their livelihood. The interest of the Association as *amicus curiae* is described in greater detail *infra* at Brief. pp. 2-3.

The Association requests that this Court grant this motion for two primary reasons. First, the Association believes that its discussion of the issues will benefit the Court. The Association has participated in two cases involving discrimination against nonresident commercial fishermen. *See Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264 (4th Cir. 1993); *Tangier Sound Watermen's Ass'n. v. Douglas*, 541 F. Supp. 1287 (E.D. Va. 1982).

Second, members of the Association have a strong interest in these issues and wish to address the implications of this case for fishermen across the country. Unconstitutional nonresident fishing fees are widespread and often prohibitively high. Unfortunately, fishermen often lack the financial resources necessary to pay or challenge nonresident fees. Because of its experience in this area, the Association would like to comment on these issues for the benefit of the Court.

Wherefore, the Association respectfully requests that this Court grant its Motion for Leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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**On Petition for a Writ of Certiorari to the Supreme Court of Alaska**

## BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

## INTRODUCTORY STATEMENT

This brief is submitted by The Tangier Sound Waterman's Association as *amicus curiae* in support of the Petition for a Writ of Certiorari.

## INTEREST OF *AMICUS CURIAE*[1]

The Tangier Sound Waterman's Association (the "Association") is an unincorporated association of approximately 80 commercial fishermen residing in Maryland in communities on Smith Island and in the vicinity of Crisfield, Maryland, on the Eastern Shore of the Chesapeake Bay. Smith Island is located at approximately the center of the Chesapeake Bay and is transected at its southernmost tip by the boundary between Maryland and Virginia. The Association's members harvest the many species of edible fish, crabs, and shellfish in the waters of the Chesapeake Bay and its tributaries.

The Association has long been concerned with discrimination against nonresident commercial fishermen. Prior to 1982, Virginia prohibited all nonresidents from commercial fishing within Virginia's territorial waters. In *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F. Supp. 1287 (E.D. Va. 1982) ("*Tangier I*"), the District Court for the Eastern District of Virginia held that Virginia's prohibition on all nonresident fishing was unconstitutional. In 1983, in reaction to the decision, the Virginia legislature imposed a fee of $350 upon nonresidents engaging in commercial fishing within the Commonwealth of Virginia.

In 1991, Virginia tripled its nonresident commercial fishing fee to $1,150 per boat. Va. Code § 28.1-47.1 (1991) (repealed 1992). The Association successfully challenged this fee as violating the Privileges and Immunities Clause of the United States Constitution. *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264 (4th Cir. 1993) ("*Tangier II*"). After the decision in *Tangier II*, Virginia's General Assembly passed another statute authorizing the Virginia Marine

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[1] No counsel for a party in this case authored this brief in whole or in part and no person or entity, other than *amicus* or its counsel, made a monetary contribution to this brief's preparation or submission.

Resources Commission (the "Commission") to establish a fee "no less than $350 or more than $1,150." Va. Code § 28.2-227 (2003). Since 1993, the Commission has charged a $350 nonresident fee. Like the prior $350 nonresident fee, the fishermen have not challenged the present fee of $350 because it is economically prohibitive for them to do so.

Many of the Association's members harvest fish in Virginia but reside in Maryland near the Virginia boundary, and thus have a particular interest in nonresident fishing fees. In addition, the Association is concerned that states do not impede, through nonresident fees, the fundamental rights of fishermen to engage in their livelihood without suffering the burden of unreasonable and discriminatory regulations. If not reviewed by this Court, the decision in this case will encourage other states to discriminate against nonresidents by enacting or increasing nonresident fishing fees in disregard of the Privileges and Immunities and Commerce Clauses of the United States Constitution.

## STATEMENT

This case involves Privileges and Immunities Clause and Commerce Clause challenges to Alaska's nonresident commercial fishing fees. Given the tendency of states to favor their own residents over nonresidents who cannot vote, parochial and discriminatory nonresident fees are a common burden and often a total barrier for commercial fishermen. Nonresident fees such as those imposed in this case are unconstitutional under both the Privileges and Immunities Clause and the Commerce Clause.

## ARGUMENT

### I.

### THERE ARE COMPELLING REASONS FOR GRANTING THE WRIT

The questions raised by Petitioners in this case merit this Court's review. States have a tendency and incentive to favor their own citizenry and industry over those of other states.[2] The desire to prevent states from taxing each other was one of the driving forces behind the Constitution. Repeatedly in The Federalist Papers, the founders argued in favor of the Commerce and Privileges and Immunities

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[2] The assessment of unconstitutional fees on nonresidents for the privilege of conducting business in a given locality is not limited to the commercial fishing industry. In *Homier Distrib. Co., Inc. v. City of New Bedford*, the court held that a city ordinance requiring non-domestic transient vendors to obtain a $2,000 license to conduct business in the city violated the Commerce Clause. 188 F. Supp.2d 33, 36 (D. Mass. 2002). The court held that the ordinance violated the Commerce Clause, which "prohibits 'state or municipal laws whose object is local economic protectionism.'" *Id.* (quoting *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)). In *City of New York v. New York*, the court held that, where no tax was imposed on commuters working in New York City and living in the State of New York, the assessment of commuter taxes on individuals working in New York City while living outside the State violated the Privileges and Immunities Clause as well as the Commerce Clause. 94 N.Y.2d 577, 587 (N.Y. App. 2000). The court noted that the statute "intentionally create[d] inequality between resident and nonresident commuters [and thus violated the] Privileges and Immunities Clause [which] plainly and unmistakably secures and protects the right of the citizens of one State to be exempt from any higher taxes or excises than those imposed by another State upon its own citizens." *Id.* at 595-96. The court held that the statute also violated the Commerce Clause and noted that the "tax clearly is assessed against the interstate labor market per se . . . and favors intrastate economic activity over interstate activity by taxing only out-of-State workers." *Id.* at 598. This Court should grant the Petition in order to review the constitutionality of such fees before other cities and states impose similar fees.

Clauses to limit the "unbridled spirit [in] regulations of trade, by which particular States might endeavor to secure exclusive benefits to their own citizens" and "the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors." The Federalist No 7, at 30 (Alexander Hamilton) and No 42, at 214 (James Madison) (G. Wills ed., 1982).

Despite the Privileges and Immunities Clause, the Commerce Clause, and the body of caselaw finding that there is no substantial reason for discriminating against nonresidents trying to earn a living in commercial fisheries, states continue to maintain discriminatory commercial fishing fees based upon state residency. For example, despite this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952), Alaska has continued to levy higher fees on nonresident commercial fishermen. After the court struck down Virginia's absolute prohibition on nonresident fishermen in *Tangier I*, 541 F. Supp. 1287 (E.D. Va. 1982), Virginia immediately implemented a nonresident fee of $350. When that fee did not keep out nonresidents, Virginia tripled the fee to $1,150. After the Fourth Circuit held that Virginia's $1,150 fee violated the Privileges and Immunities Clause in *Tangier II*, 4 F.3d 264 (4th Cir. 1993), Virginia authorized yet another nonresident fee. *See* Va. Code § 28.2-227. At least thirty-four other states discriminate against commercial fishermen by imposing nonresident fees. *See* Petition at n.8.

This unconstitutional discrimination is pervasive because there are real and significant impediments to challenging nonresident fees. Commercial fishermen usually operate independently and tend to be loosely organized, if at all. Even when fishermen are organized, they often lack the financial resources necessary to mount a legal challenge against a state. Moreover, nonresident fishermen are helpless to challenge the laws through the political process in

states where they do not reside. As a result, commercial fishermen across the country continue to pay unconstitutional fees or are precluded from participating in a state's fishing industry. Given these national implications, the Petition should be granted.

## II.

## THE DECISION OF THE SUPREME COURT OF ALASKA DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT

The decision of the Supreme Court of Alaska conflicts with previous Privileges and Immunities and Commerce Clause holdings of this Court.

### A. The Decision Below Conflicts With Privileges And Immunities Clause Decisions Of This Court

In contrast to the holding of the Supreme Court of Alaska, this Court and other courts have consistently held that nonresident fishing fees violate the Privileges and Immunities Clause.[3] As recognized by the Supreme Court of Alaska, the statute under review is subject to an inquiry under the Privileges and Immunities Clause because

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[3] The leading case is *Toomer v. Witsell*, 334 U.S. 385, 399 (1948), in which this Court held that South Carolina's $2,500 fee for nonresident shrimp fishermen violated the Privileges and Immunities Clause. This Court again addressed the issue of nonresident fishing fees in *Mullaney v. Anderson*, 342 U.S. 415 (1952). In *Mullaney*, the then territory of Alaska imposed a $5 license fee on resident fishermen and a $50 fee on nonresidents. 342 U.S. at 416. This Court held that Alaska's discriminatory fees violated the Privileges and Immunities Clause. Other cases invalidating nonresident commercial fishing fees include *Tangier II*, 4 F.3d 254 (4th Cir. 1993) (Virginia's $1,150 nonresident fee violated privileges and Immunities Clause) and *Gospodonovich v. Clements*, 108 F. Supp. 234 (E.D. La. 1951) (nonresident fishing fees in Louisiana held invalid under Privileges and Immunities Clause).

"[c]ommercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause." *Carlson v. Alaska*, 798 P.2d 1269, 1274 (Al. 1990). Alaska discriminates against nonresident fishermen and denies them a privilege and immunity of citizenship by charging them more for a fishing license than it charges residents. *See Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978) ("'[A] resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.'") (quoting *Ward v. Maryland*, 79 U.S. 418 (1870)).

Although this Court has noted that discrimination can be upheld if "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination against nonresidents bears a substantial relationship to the State's objective," the fee differential at issue in this case is not justified because it is not closely related to a "substantial reason" for the discrimination. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). In order to justify a discriminatory license, "nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.'" *United Bldg. and Const. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 222 (1984) (quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)). In the lower court's decision, the Supreme Court of Alaska did not identify a peculiar source of evil posed by nonresident fishermen to the state's fisheries.

Even if the Court determines that there was a "substantial reason" for the discrimination, the Court should still find the statute to be unconstitutional because the discrimination does not bear a substantial relationship to any objective of the state. *See Piper*, 470 U.S. at 284. Petitioner has argued persuasively that jurisprudence from the negative Commerce Clause cases should be used to analyze the

relationship between the fee differential and the State's objective, as this Court has noted that the Privileges and Immunities Clause and the Commerce Clause have a "mutually reinforcing relationship." *Hicklin*, 437 U.S. at 248. Based on this Court's negative Commerce Clause jurisprudence discussed below, the higher license charged to nonresident fishermen should fail because Alaska has not identified a charge imposed on resident fishermen for which the surcharge is meant to compensate. *See Tangier II*, 4 F.3d 264, 268 (4th Cir. 1993) (holding that Virginia statute in which nonresident harvester's license fee was derived by dividing the amount that the state spent on all fishermen, commercial and recreational, by the number of resident commercial fishermen was unconstitutional because "nonresident fishermen [were] being charged unfairly for programs funded by all taxpayers to benefit all fishermen, whether commercial or sport fishermen").

## B. The Decision Below Conflicts With Negative Commerce Clause Decisions Of This Court

In addition to violating the Privileges and Immunities Clause, the imposition of higher license fees for nonresident fishermen violates the negative Commerce Clause based on previous decisions of this Court. Contrary to the holding of the Supreme Court of Alaska in this case, the imposition of different fees based on the residency of the applicant is subject to review under the negative Commerce Clause as "the transportation of persons across state lines . . . has long been recognized as a form of 'commerce.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997). The surcharge imposed on nonresident commercial fishermen creates protectionist barriers to interstate commerce and thus is beyond the scope of permissible state regulation under the Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (striking down New Jersey statute that prevented the

importation of waste from outside the state); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon*, 511 U.S. 93 (1994) (declaring unconstitutional a state law that charged more for disposal of out-of-state waste than for disposal of waste generated in-state).

In assessing a higher fee for nonresident fishing licenses than for comparable resident licenses, Alaska has enacted a surcharge on nonresident fishermen that resembles a compensatory tax. This Court has recognized that states may require "'those engaged in interstate commerce [to pay] their just share of state tax burden[s]'" through the imposition of compensatory taxes. *Oregon Waste*, 511 U.S. at 102 (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). Alaska contends that the surcharge on nonresident fishing licenses compensates the State for the funds contributed by resident fishermen for the maintenance of the State's fisheries. As noted by the Supreme Court of Alaska, "oil revenues spent on conservation could have been used to benefit residents through various other programs and they are, analytically, equivalent to taxes which only residents pay." *Alaska Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 855 (Al. 2003) (internal quotation marks omitted).

Although this Court has recognized that "interstate commerce may be made to 'pay its way,'" the fee differential is unconstitutional because the State has not satisfied the three requirements for a valid compensatory tax. *Oregon Waste*, 511 U.S. at 102 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977)). A state imposing a compensatory tax must first

> identif[y] . . . the [intrastate burden] for which the State is attempting to compensate. . . . Once that burden has been identified, the tax on interstate commerce must be shown

> roughly to approximate – but not exceed – the amount of the tax on intrastate commerce. . . . Finally, the events on which the interstate and intrastate tax are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive prox[ies] for each other.

*Id.* at 103 (internal quotation marks omitted).

As in *Oregon Waste*, in which this Court invalidated Oregon's statute that charged more for the disposal of waste transported from outside of Oregon than for the disposal of waste generated in the State, the Alaska license fee for nonresident fishermen is unconstitutional because it does not qualify as a valid compensatory tax. *Id.* First, Alaska has not identified a valid intrastate tax burden for which the State is attempting to compensate. Alaska employs a complicated formula in an effort to calculate the funds that resident fishermen allegedly contribute to the maintenance of the State's fisheries. In so doing, the State analogizes the per capita portion of oil revenue that is used to maintain the fisheries to a state tax paid by residents and suggests that the fee differential is designed to compensate for this "tax" burden. This Court, however, has recognized the "danger of treating general revenue measures as a relevant intrastate burden for purposes of the compensatory tax doctrine," *Fulton Corp. v. Faulkner*, 516 U.S. 325, 335 (1996), and has repeatedly declined to open a loophole in the compensatory tax jurisprudence that "'would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds.'" *Oregon Waste*, 511 U.S. at 105 (quoting *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992)). This Court, accordingly, should hold the nonresident license fee to be unconstitutional and decline to

justify the surcharge as compensation for an intrastate burden calculated as a portion of the State's general oil revenues.

Second, the "tax" on interstate commerce does not roughly approximate the amount of the "tax" on intrastate commerce. In *Oregon Waste*, this Court found that the Oregon surcharge of $2.25 on waste transported from out-of-state was not a compensatory tax because Oregon did not "impose a specific charge of at least $2.25 per ton on shippers of waste generated in Oregon, for which the out-of-state surcharge might be considered compensatory." 511 U.S. at 104. Similarly, the formula employed by the State to calculate the surcharge on nonresident fishing licenses does not accurately calculate a burden on intrastate commerce because the formula theoretically calculates the burden borne by all Alaska residents rather than the burden borne by resident commercial fishermen.

Third, the events on which the interstate and intrastate fees are imposed are not "substantially equivalent" because they are not sufficiently similar to serve as mutually exclusive proxies for each other. *Id.* at 103. In order for the fees to satisfy this third requirement, they must be imposed on comparable taxable events. Unlike "[t]he prototypical example of substantially equivalent taxable event [which] is the sale and use of articles of trade," the State compares dissimilar events in calculating the license fee for nonresident fishermen. *Id.* at 105. Alaska compares the license fee imposed on nonresident fishermen to the fee imposed on resident fishermen *plus* an allocation of oil revenue. Because Alaska compares dissimilar events that are not "mutually exclusive" proxies for each other, the surcharge is unconstitutional. *Id.* at 103.

Because the Alaska surcharge on nonresident fishing licenses does not satisfy the requirements of a valid

compensatory tax, this Court's decisions dictate that the surcharge is unconstitutional as violative of the negative Commerce Clause.

## CONCLUSION

For the reasons set forth above, the Tangier Sound Waterman's Association respectfully requests that the Court grant the Petition and reverse the decision of the Supreme Court of Alaska.

Respectfully submitted,

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